

1 **[The R.M.C. 803 session was called to order at 0911, 14 July 2008.]**

2 MJ [CAPT ALLRED]: Court's called to order. Let me see, all
3 parties present when the court last recessed are once again present
4 with a couple of--a couple of exceptions. I see a new face at the
5 trial counsel table.

6 This is the first time you are here on the record is it
7 not, Mr. Trivett?

8 CTC [MR. TRIVETT]: Yes, sir. Good morning, Your Honor.

9 MJ [CAPT ALLRED]: Good morning.

10 CTC [MR. TRIVETT]: Clay Trivett for the United States. I've
11 been detailed to this military commission by the chief prosecutor. I
12 am qualified under R.M.C. 503, and I have been previously been sworn
13 in accordance with R.M.C. 807. I have not acted in any manner that
14 might tend to disqualify me in this proceeding. And I believe the
15 detailing order is marked as Appellate Exhibit 006, sir.

16 MJ [CAPT ALLRED]: Very well. I've seen your name on many of
17 the filings over the last year or more. Glad to know that you're
18 actually alive.

19 CTC [MR. TRIVETT]: Yes, sir.

20 MJ [CAPT ALLRED]: And here.

21 At the defense table, is everyone still--with the team--
22 still as it was? It's hard to remember from time to time.

23 DC [LCDR MIZER]: Yes, Your Honor.

1 MJ [CAPT ALLRED]: Good morning, Commander.

2 DC [LCDR MIZER]: Good morning, sir.

3 TC [LCDR STONE]: Sir, if I may, one other exception from the
4 prosecution table for the record. Lieutenant Colonel Will Britt,
5 U.S. Army has left active duty and is no longer at the prosecution
6 table. I will be assuming lead prosecutor.

7 MJ [CAPT ALLRED]: Very good, thank you.

8 TC [LCDR STONE]: Major Ash--Omar Ashmawy will be joining the
9 prosecution probably on Monday.

10 MJ [CAPT ALLRED]: Okay, we'll give Colonel Britt our best
11 regards.

12 TC [LCDR STONE]: Yes, sir.

13 MJ [CAPT ALLRED]: Wherever his duties have taken him.

14 The first item of business for this morning has been marked
15 D-052, it's a motion to withdraw as counsel of record submitted on
16 behalf of Andrea Prasow, a member of the defense team for the past
17 year.

18 Does the government oppose this motion?

19 TC [LCDR STONE]: No, sir, we do not.

20 MJ [CAPT ALLRED]: Very good.

21 Good morning Mr. Hamdan. Glad to see you today.

22 The interpreters--apparently there is no--I said you're not
23 hearing the Arabic in your headset I gather [REDACTED]?

1 Are you hearing? **[Positive response.]**

2 Mr. Hamdan, I have here a motion filed by Ms. Andrea

3 Prasow, who has been a member of your defense team for the last year.

4 In this motion she asked to withdraw from further participation as

5 part of your defense team.

6 Are you familiar with this request?

7 ACC [MR. HAMDAN]: Yes I am.

8 MJ [CAPT ALLRED]: Thank you. Do you agree--she tells me in

9 this letter that you have asked her to withdraw is this true?

10 Apparently it's not coming through the headsets.

11 COURT INTERPRETER: Could you repeat, please?

12 MJ [CAPT ALLRED]: The question is for Mr. Hamdan, do you agree

13 and did you in fact approve Ms. Prasow to withdraw from your defense

14 team? **[Discussion at the defense table.]**

15 ACC [MR. HAMDAN]: I disagree.

16 MJ [CAPT ALLRED]: You disagree?

17 Okay, Mr. Hamdan----

18 CDC [MR. SWIFT]: Could we have a moment to consult?

19 MJ [CAPT ALLRED]: Oh sure.

20 CDC [MR. SWIFT]: 'Cause I think there may be a confusing----

21 MJ [CAPT ALLRED]: I'm sorry; I thought this would be an easy

22 exchange. **[Discussion at defense table.]**

1 CDC [MR. SWIFT]: A brief recess in place if you will, Your
2 Honor.

3 MJ [CAPT ALLRED]: Of course.

4 CDC [MR. SWIFT]: Two minutes.

5 MJ [CAPT ALLRED]: We will stand in a recess in place.

6 **[The R.M.C. 803 session recessed in place at 0917, 14 July 2008.]**

7 **[The R.M.C. 803 session was called to order at 0921, 14 July 2008.]**

8 MJ [CAPT ALLRED]: The court is called back to order.

9 CDC [MR. SWIFT]: Your Honor, we understand that Mr. Hamdan has
10 in fact changed his mind. He would like to keep Ms. Prasow on his
11 case. This process will is--the motion indicated Ms. Prasow was un-
12 detailed from the case. The assistant chief defense counsel is
13 working to rectify that because Mr. Hamdan [sic]--who is detailed,
14 was un-detailed solely on the understanding Mr. Hamdan didn't want
15 Ms. Prasow seated in this case. That being a material change in
16 fact, he will re-detail Ms. Prasow--is prepared to stay in the
17 courtroom today. She has no role in the first set of motions being
18 argued. And we're prepare to--prepared to proceed with the
19 understanding that she will be re-detailed later today to the court--
20 if that meets the court's approval.

21 MJ [CAPT ALLRED]: Well, it certainly does. I want Mr. Hamdan
22 to have the defense team of his choice and if you would like Ms.
23 Prasow to remain in his team, I am sure she can be re-detailed.

1 So D-052, motion to withdraw as counsel of record is then
2 withdrawn by the defense.

3 Is that right? That is how the court will----

4 DC [LCDR MIZER]: Correct.

5 CDC [MR. SWIFT]: That is correct, Your Honor.

6 MJ [CAPT ALLRED]: Very good. I would just like to go through a
7 couple of items of paperwork that reflected the things that happened
8 since our last meeting on the record.

9 I have an e-mail here from Colonel Britt, dated May 8, that
10 says Witness B, the elusive Witness B, has been located and
11 identified and that was given to the defense.

12 You've had a chance now to interview Witness B?

13 DC [LCDR MIZER]: Yes, Your Honor; we have.

14 MJ [CAPT ALLRED]: Very good.

15 There was an issue about the 6th of May that resulted in a
16 telephonic 802 conference. The issue was that Mr. Ridenour had
17 become aware of certain materials in the database that--I don't know.
18 Are these--these are defense--these are defense materials that had
19 somehow been discovered. As I recalled, Ms. Prasow went to look
20 through the materials and the members of the prosecution indicated
21 they'd never see the materials, and no members of the prosecution had
22 seen the materials.

1 Is there any issue with respect to the Harmony database
2 that needs to be addressed this morning?

3 DC [LCDR MIZER]: Defense believes that there is no issue at
4 this time, Your Honor.

5 MJ [CAPT ALLRED]: Okay. Very good, thank you.

6 As a matter of fact, I--okay. We will call that resolved
7 then.

8 The next motion I have here is D-041, a request for a 909
9 hearing. Lieutenant Colonel--Lieutenant Commander Britt--I didn't
10 want to say Britt----

11 DC [LCDR MIZER]: Mizer.

12 MJ [CAPT ALLRED]: Mizer, I beg your pardon. I understand that
13 you, in light of that revealed by Dr. Ricci had been withdrawing that
14 motion; is that where we're at?

15 DC [LCDR MIZER]: That is correct, Your Honor. And given the
16 findings of the R.M.C. 706 board, Mr. Hamdan has met the low
17 threshold of competence to stand trial.

18 MJ [CAPT ALLRED]: Very good, we will consider then D-041, the
19 request for a 909 hearing into the competence of the accused to be
20 withdrawn.

21 Okay. What motion do we need to take up next? I have
22 three others that we are scheduled for today.

1 TC [LCDR STONE]: Sir, we defer to the defense to do whichever
2 motion Mr. McMillan needed otherwise do.

3 CDC [MR. SCHNEIDER]: Your Honor, we have high hopes to address
4 a couple of motions with Mr. McMillan speaking first. His PowerPoint
5 is in process and on its way. I'm happy to argue the HVD motion
6 while his PowerPoint is transferred down here.

7 MJ [CAPT ALLRED]: Without his PowerPoint, he's helpless. He's-
8 ---

9 CDC [MR. SCHNEIDER]: No, he's very good without it; he's very
10 good with it. He sure has worked hard on it, and I would ask that he
11 be permitted to use it.

12 MJ [CAPT ALLRED]: Well, we'll be happy to take the motion you
13 would like to argue, D-051, detainee arrangements?

14 CDC [MR. SCHNEIDER]: Your Honor, we would request that you
15 instruct the bailiff to permit----

16 MJ [CAPT ALLRED]: He has.

17 DC [LCDR MIZER]: It's already been done.

18 CDC [MR. SCHNEIDER]: I'm sorry, thank you.

19 MJ [CAPT ALLRED]: Your LN1 to come in?

20 CDC [MR. SCHNEIDER]: Yes.

21 MJ [CAPT ALLRED]: Yes, he has; I'm sorry.

22 CDC [MR. SCHNEIDER]: As usual you're ahead of me.

1 With the court's permission--Harry Schneider on behalf of
2 Mr. Hamdan. The motion D-051 seeks relief of two regards. Whatever
3 final impediments remain to calling these detainee witnesses to
4 testify should be resolved by the government and second, we request
5 the opportunity to conduct a pretrial interview with these witnesses.

6 In effect, we're asking for confirmation that the
7 impediments that this court observed as far back as December, be
8 resolved before next week when trial starts. As you recall, you've
9 asked the government back in December, December 17, to determine
10 exactly what obstacles exist. I don't intend to recite the
11 chronology of developments. We've been down this path several times,
12 by the same issues before us today that have been argued and
13 resolved, in my view, on previous occasions.

14 Where we are today is essentially set forth in the
15 government's opposition at the bottom of page three and on page five.
16 With respect to six of the witnesses, "the government submits
17 production is not required and it will take no action to bring them
18 here." Page five, "the government does not intend to take steps to
19 produce either witness." There's no ambiguity about the government's
20 position. And in effect, the exercise we've been through, the
21 prosecution and defense, the court, sounds like it's a bit for
22 naught. It's almost like no matter what happens, the government
23 doesn't intend to produce these witnesses.

1 I really want to make two points and I'll try to be brief
2 and reserve any time for rebuttal if there's additional questions.

3 Two points that I don't think came out of the briefs quite
4 as vividly as I would like.

5 Number one, what factual support, what evidence in the
6 record through objection; there is nothing there. National security,
7 seven months in the making to draft an affidavit instead of address
8 and resolve. There is nothing else; there is nothing from anyone in
9 national security.

10 Number two, the credibility of the government's objection.
11 And I don't--I don't criticize trial counsel, we all have clients in
12 this case. But frankly the government would have this commission
13 believe the sky will fall if these witnesses testify. We've been
14 told that throughout on all opposed strenuously resist, genuine
15 threat to national security. In my view, I have never seen such an
16 alarming prediction of dangerous and dire consequences so
17 unaccompanied by any credible evidence.

18 If the objection is genuine, if it was genuine in December,
19 in January, February and March, either to the written questions the
20 objection is made; if it was genuine. The government would have
21 already taken an immediate appeal to prior orders, as it has
22 unfettered discretion to appeal. The fact that it hasn't is
23 revealing. It tells us that the dire consequences that were basis

1 for the unalterable opposition that passed, un-reflection the
2 government can live with it. If they couldn't, we would've had an
3 appeal already.

4 So I submit we're in the same posture, we have the same
5 predictions, we have the same concerns. And I think the court would
6 be correct to ask a couple of questions itself.

7 Why is it that arrangements can be made for those same
8 witnesses to attend court on the fifth of June and last week to speak
9 freely among themselves on occasions and with counsel in the
10 courtroom, in the presence of media and guards, personnel? But we're
11 told that the same arrangements cannot be made in this courtroom
12 later this month for their testimony as fact witnesses to appear as
13 both relevant and necessary.

14 And the second question that the court, a minefield,
15 rightfully could ask is this; if the government had concluded that
16 the factual testimony of the same witnesses was important to its
17 case, maybe relevant and necessary; do you think the government would
18 convince the government to allow the government to bring the
19 witnesses to testify for the government?

20 I'll be available for any questions **[heading back to**
21 **defense table]**.

22 MJ [CAPT ALLRED]: I do have some questions.

1 CDC [MR. SCHNEIDER]: **[Moves to back to the podium.]** I am still
2 available.

3 MJ [CAPT ALLRED]: The government's reply brief makes a
4 distinction between the two who have answered your written questions,
5 the two who have not answered your written questions, and the four to
6 whom no written questions have been asked.

7 Why should I not treat those groups of detainees
8 differently?

9 CDC [MR. SCHNEIDER]: The reason you should not treat them the
10 same, excuse me, differently, is this. The synopsis of testimony on
11 which your earlier order was made remains in tact. We have done
12 everything we can do to provide that. There is nothing more we can
13 do without meeting with them.

14 With regard to the four, you will recall, your order
15 specifically said that these who have counsel, we shall abide by our
16 professional obligations, I think is the phrase, counsel for four
17 have requested that we do not contact them, so we didn't send them
18 questions. I don't believe that that indicates they are unwilling or
19 unable to testify.

20 MJ [CAPT ALLRED]: So you propose then to have them brought to
21 the courtroom and first discover here, whether or not they will
22 answer your questions?

1 CDC [MR. SCHNEIDER]: Absent the change in position by their
2 counsel, but frankly, I think is likely to know there'll going to
3 testify, that is what I propose. If they take the stand and refuse
4 to answer, as in most other proceedings, that's it. We have made our
5 proffer, we have attempted, and we failed. It won't take long.

6 With regard to the same subject, why should you allow us to
7 call those, where we don't have written answers? In part because the
8 written answers we have received indicate that our proffer, back in
9 January and February to Lieutenant Commander Mizer's declaration, was
10 accurate. I don't think it's a stretch. I think it is the logical
11 conclusion that when we predict, based on what we know and what we've
12 been told that those eight witnesses have relevant testimony; the
13 only ones that answered, demonstrate that we were right. I think
14 that that goes in favor of a logical conclusion that the other six
15 who must know. If the answer didn't come back the other way, frankly
16 I'd be before you today, saying, you know what, the only evidence
17 you've seen, seems to indicate that all eight don't have any
18 information.

19 So I think, under the circumstances, given the restrictions
20 that have been imposed on access prior, understandable. I think we
21 should still has access to those six based on, in part, but with the
22 two who have responded and said. If any of the other six had said, I
23 know nothing. I'd have a different answer for you.

1 MJ [CAPT ALLRED]: But the two who received written questions
2 and did not respond; what would you make of that?

3 CDC [MR. SCHNEIDER]: What I make of that is a continuing
4 skepticism on the part of those two witnesses as to whether or not
5 the questions truly are from Mr. Hamdan's defense counsel as opposed
6 to an interrogator. It's the problem with trust.

7 I think the court will recall that we had some logistical
8 problems getting a letter, a handwritten letter to Mr. Hamdan's--to
9 those two, so I can, and again I would not read into that, either a
10 reluctance or inability to testify and I would read into it based on
11 the other two answers, and that given their positions and the
12 leadership of an organization, whose members Mr. Hamdan is alleged to
13 have conspired with that they would have personal knowledge, which is
14 relevant.

15 MJ [CAPT ALLRED]: Okay, thank you. Those are my questions.

16 CDC [MR. SCHNEIDER]: May we offer one more piece of information
17 from Lieutenant Commander Mizer?

18 MJ [CAPT ALLRED]: Both to call him as a witness overtures to
19 have him up here----

20 CDC [MR. SCHNEIDER]: No, I think, maybe just to have him up
21 here at the podium.

22 MJ [CAPT ALLRED]: Of course.

1 DC [LCDR MIZER]: Your Honor, I just want to note for the record
2 that last Friday, the 11th of July, 2008, I was contacted by Mr. Ed
3 McMahon, who is a civilian attorney currently representing Walid bin
4 Attash.

5 MJ [CAPT ALLRED]: Is he--I'm sorry, remind me which of--which
6 category he falls into.

7 DC [LCDR MIZER]: He is one of the standby counsel, if that's
8 what----

9 MJ [CAPT ALLRED]: No, no. Walid bin Attash, is he one of the
10 four?

11 CDC [MR. SCHNEIDER]: He's answered.

12 DC [LCDR MIZER]: Walid bin Attash, one of the two that has
13 answered, Your Honor.

14 MJ [CAPT ALLRED]: Two that have answered it. Okay.

15 DC [LCDR MIZER]: Yes, Your Honor.

16 MJ [CAPT ALLRED]: Okay. Please go ahead.

17 DC [LCDR MIZER]: And we spent most of the day last Friday out
18 at JTF, at the camp because Mr. bin Attash would like to meet with me
19 and would like to discuss his testimony in which he anticipates to
20 exonerate Mr. Hamdan of the most serious charge in this case.

21 As of last Friday that request to meet with Mr. bin Attash
22 had not been approved and was awaiting approval at the Special
23 Detainee Follow-up Group. And, Your Honor, you'll recognize that

1 because that's the group that Colonel Morris Davis testified about
2 several months ago, at which he attended one meeting of that group
3 where Deputy Secretary of Defense Gordon England suggested that the
4 charges should be referred in that case for political value. I raise
5 that again because if the Special Detainee Follow-up Group is in fact
6 in charge of whether or not Mr. Hamdan and has access to exculpatory
7 witnesses, we would have a problem with unlawful command influence.
8 We're hopeful that you will give us access to--to these two witnesses
9 in particular, and resolve that issue, but I did want to note for the
10 record that Mr. bin Attash has in writing, through counsel, agreed to
11 meet with me and to testify in Mr. Hamdan's defense.

12 MJ [CAPT ALLRED]: But you did not meet with bin Attash last
13 Friday?

14 DC [LCDR MIZER]: I did not, Your Honor.

15 MJ [CAPT ALLRED]: Okay.

16 DC [LCDR MIZER]: I was not permitted to. I have all the
17 requisite clearances to do so, but I was told as of, after waiting
18 all day out at the camps and going through various levels of
19 approval, it's now at this Special Detainee Follow-up Group for the
20 ultimate decision as to whether or not I will be permitted to meet
21 with Mr. bin Attash.

22 MJ [CAPT ALLRED]: Okay.

1 DC [LCDR MIZER]: We may just need to get a court order, will in
2 fact be necessary to allow us access to this witness.

3 MJ [CAPT ALLRED]: Okay.

4 Mr. Trivett?

5 CTC [MR. TRIVETT]: **[Walking to the podium]**. Sir, defense
6 counsel is quite correct in the fact that the sky may not fall if the
7 accused is granted access. But it's not the sky that the prosecution
8 is concerned about falling. This is not meant to be sure trade or
9 meant to be cute, but the prosecution is charged with protecting the
10 national security of the United States in these proceedings. The
11 detainees that they seek access to hold in their heads some of the
12 most serious national security and intelligence sources and methods
13 that the United States has. Without being able to protect those
14 methods, it's not the sky that will fall, it's another building.
15 That's our main concern.

16 The prosecution's been charged with protecting the national
17 security interest in this case and as of now, we're being put in an
18 impossible situation to be able to do so.

19 We do want to address specifically this issue of Khalid
20 Sheik Mohammed and Walid bin Attash.

21 MJ [CAPT ALLRED]: May I interrupt you for a moment?

22 CTC [MR. TRIVETT]: Sure.

1 MJ [CAPT ALLRED]: You see the little lights in front of you on
2 this?

3 CTC [MR. TRIVETT]: Yes, sir.

4 MJ [CAPT ALLRED]: All right, that's from the interpreter and
5 when that is yellow, it means that he is having trouble keeping up
6 with you.

7 CTC [MR. TRIVETT]: Yes, sir.

8 MJ [CAPT ALLRED]: Okay, Walid bin Attash.

9 CTC [MR. TRIVETT]: Should I wait until it's green, sir?

10 MJ [CAPT ALLRED]: No, I think you can go.

11 CTC [MR. TRIVETT]: On the issue of Khalid Sheik Mohammed and
12 Walid bin Attash specifically, contrary to the defense claims, the
13 defense has not informed the prosecution regarding what Khalid Sheik
14 Mohammed and Walid bin Attash may say, if called to testify.

15 They did give a proffer, initially, of what they believe he
16 may say based on assertions from an admitted al Qaeda member. They
17 have now made statements that are consistent with that proffer.
18 However, the prosecution has no ability to refute that because we
19 haven't seen the answers and we haven't seen the proffer as what he
20 will say.

21 Under Military Commissions Rule of Evidence 505(g) and
22 R.M.C. 703, the government is entitled to a synopsis of the
23 testimony. This is especially important when national security

1 implication are at stake, so the prosecution is able to articulate a
2 basis----

3 MJ [CAPT ALLRED]: Okay, I am fully aware of this, the need for
4 a proffer. In what respect do you feel like their--as I see, the
5 defense's position, they have now assured us that the proffer they
6 gave last January, whenever, is a proffer. And that they have
7 confirmed that based on their written questions.

8 Do you understand that to be the proffer of what he will
9 say?

10 CTC [MR. TRIVETT]: We don't, sir. Quite frankly, we don't
11 understand that to be the case. And the situation is, and why it's
12 particularly concerning in this case, is that while the defense may
13 believe that the proffer--unless the proffer--unless a proffer is
14 verbatim, sir, the prosecution is unable to protect the national
15 security implications that may be involved from the words or phrases
16 that may be different from the defense's first proffer. Almost
17 certainly the answers provided by Khalid Sheik Mohammed and Walid bin
18 Attash are not verbatim with that proffer. And 505 requires
19 particularity and the reason it requires particularity in the notice,
20 is so that the government can effectively determine what national
21 security implications are in play and how reasonable alternatives may
22 be available to having live testimony. That's our concern.

1 MJ [CAPT ALLRED]: My sense is that the defense doesn't intend
2 to disclose any classified information.

3 CTC [MR. TRIVETT]: Yes, sir. And we----

4 MJ [CAPT ALLRED]: I've heard that there is this presumption
5 that everything they say is classified; is that really the
6 government's position?

7 TC [LCDR STONE]: That is correct, sir. That is correct--that
8 any of the individuals that have been acknowledged to be in the CIA's
9 program and this is set forth in the unclassified declaration by
10 Wendy Hilton, all of the words out of their mouths are to be
11 presumptively TOP SECRET codeword information. And that is because
12 in the minds of these individuals, they hold some of the most closely
13 guarded secrets in the United States' intelligence community.
14 Without proper clearances and the need to know, inadvertent
15 disclosure of that information can have grave confidence consequences
16 on the national security of the United States.

17 MJ [CAPT ALLRED]: Okay, so let's assume that they now give you
18 a proffer, a different proffer that may even contain the exact
19 questions and answers that they posed to these witnesses.

20 Would that get over the proffer hurdle?

21 CTC [MR. TRIVETT]: Yes, sir.

22 MJ [CAPT ALLRED]: Then you know what specifically they wrote on
23 their pages; what's the next hurdle?

1 CTC [MR. TRIVETT]: I think, the next hurdle, sir, is that we
2 maintain the same thing in the adversarial process that once that
3 proffer is made with specific particularity, the government would
4 then have an opportunity to look at it and one, potentially object to
5 the relevance and necessity of the information. Now clearly based on
6 the previous proffer, the government can articulate several bases by
7 which the testimony is simply not relevant. But that being said,
8 after we get into that issue, after the military judge decides the
9 issues, you know, after both sides are able to brief them on that,
10 then the government would propose some type of adequate remedy to
11 ensure that's not required that the accused [sic] come and testify in
12 a live format.

13 So I think that would be a two step process. One, the
14 prosecution would like the ability to be able to object to the
15 relevancy and necessity of the information if--depending on what the
16 proffer says, we're not taking the position that it definitely is; it
17 definitely isn't. We're taking the position that we can't articulate
18 a basis yet because we don't know exactly what's going to be said.
19 That being said, the second part would be for us to have the ability
20 to meet with defense and potentially fashion an adequate substitute
21 that would allow for the defense to put forth the information that it
22 feels is necessary for their case, as well as, allow the prosecution
23 to protect the national security interests of the United States.

1 MJ [CAPT ALLRED]: So if the proffer comes back from the defense
2 and it says Khalid Sheik Mohammed is going to testify that he lived
3 in Kandahar.

4 CTC [MR. TRIVETT]: That the accused lived in Kandahar, sir, or-
5 ---

6 MJ [CAPT ALLRED]: I mean any benign statement.

7 CTC [MR. TRIVETT]: Yes, sir.

8 MJ [CAPT ALLRED]: The government's position is going to be that
9 the defense now proposes to reveal classified information; is that
10 right? Is it this presumptive classification of everything they say-
11 -are we going to carry that to that extreme?

12 CTC [MR. TRIVETT]: Correct. It is all presumptively classified
13 until it is reviewed. And the way that this is working in the case
14 of the 9/11 co-conspirators is that the statements go through a
15 process by which they're monitored by a court security officer and
16 other intelligence equity holders, to ensure or to determine whether
17 or not it's classified. If it's not classified then after a certain
18 period of time--of time delay, is able to go out to the public. But
19 that being said, until it's reviewed by the appropriate officials in
20 whatever meanings it comes in, whether it comes from testimony or
21 whether it comes to the written questions. Until that time, it's
22 presumed to be classified at the TOP SECRET level.

1 Now, something like that, I'm quite certain, and I don't
2 feel like I'm out of place to say that they will have no issue with
3 the fact that Khalid Sheik Mohammed said that he had lived in
4 Kandahar. But ultimately that's not my determination. I'm not the
5 equity holder of the information.

6 MJ [CAPT ALLRED]: Well, have you taken the proffer as it
7 currently exists to the equity holders for a review?

8 CTC [MR. TRIVETT]: I know they have seen it. I do not believe
9 that--my understanding of what happened is that the equity holders
10 were able to review the document after the answers came through.
11 They aren't able to communicate the contents of it. But they have to
12 look at it for part--for classification and they did, in fact,
13 because I know the defense has attempted to have an in-camera
14 presentation of the redactions. So that's part of the process with
15 the written questions. But obviously, it's a little bit different
16 when dealing with live testimonies as opposed to something in
17 writing.

18 MJ [CAPT ALLRED]: Well, see that's the problem. The best that
19 the defense is going to be able to do is proffer what they know from
20 the written questions. And if one of these witnesses wants to depart
21 from that or add a little aside; there's no way to predict whether
22 that may or may not happen.

1 CTC [MR. TRIVETT]: Yes, sir; and that is exactly the
2 government's point. And that's why we're so concerned about the
3 issue of live testimony.

4 I have no doubt the defense does not seek to elicit
5 anything that it knows to be classified information, as all
6 litigators know; the question you ask and the answer you get is not
7 always what you intend.

8 MJ [CAPT ALLRED]: Well, let's assume that the defense just
9 turns over to you now, the questions and the answers from these
10 witnesses. You review them and you say to yourself, this looks good,
11 this doesn't look like it's going to be a classified disclosure, and
12 its public knowledge or we don't have any problem with it.

13 CTC [MR. TRIVETT]: I think the first thing, sir, is that the
14 prosecution would take the answers and we would determine whether or
15 not we want to object to the relevance and materiality of it that
16 certainly would be the first step.

17 MJ [CAPT ALLRED]: Well, relevance is a low standard. Let's
18 assume they we get over that one.

19 CTC [MR. TRIVETT]: If you get over that standard, we would then
20 obviously ask the equity holders to look at and see whether there are
21 specific concerns were, if any.

22 MJ [CAPT ALLRED]: But the equity holders have already seen
23 this. They saw the questions go in; they saw the answers come out.

1 CTC [MR. TRIVETT]: Correct, and to the extent that they can----

2 MJ [CAPT ALLRED]: You're the only one who doesn't know and I'm
3 the only one who doesn't know what those words were, right?

4 CTC [MR. TRIVETT]: Correct, and to the extent that it's just
5 that piece of paper with those questions and answers, I'm comfortable
6 saying that the equity holder is not concerned about its
7 classification. I believe that this was released, although I do not
8 know in an unclassified format to the defense.

9 MJ [CAPT ALLRED]: Yes, I think all of them were released with a
10 couple of redactions, so even the defense doesn't know what the
11 answers to those questions would be and presumably we won't go there.

12 So I guess what I am saying is, even if the defense now
13 turns over to you, the prosecution, these questions and answers, you
14 give them to the equity holders for review, they've already seen them
15 and they've already cleared them.

16 CTC [MR. TRIVETT]: Yes, sir; absolutely. The concern, no
17 longer for the government, is that one piece of paper with those
18 questions and those answers. The concern with the government is what
19 other information may be disclosed if the defense counsel goes and
20 has direct access and speaks to one of these detainees. And if one
21 of these detainees is permitted to testify live, what may be
22 disclosed in the courtroom through his testimony, regardless of what
23 the defense asks.

1 MJ [CAPT ALLRED]: Well, let's talk about that. I assume, I
2 mean, Commander Mizer, I think is representing either one of these
3 guys or someone who's a high-value detainee; is that right?

4 DC [LCDR MIZER]: One of the five, Your Honor; but not one of
5 the ones that we wish to speak with.

6 MJ [CAPT ALLRED]: Okay, so he's already meeting, I guess with
7 that guy somewhere without supervision; is that right?

8 CTC [MR. TRIVETT]: With his accused, sir?

9 MJ [CAPT ALLRED]: With his accused.

10 CTC [MR. TRIVETT]: That is correct. I would imagine.

11 MJ [CAPT ALLRED]: So the government is at risk then that he
12 might learn something from that accused that is TOP SECRET and you've
13 trusted him to not to disclose it; isn't that an adequate protection?

14 CTC [MR. TRIVETT]: In regards to the access specifically for
15 Lieutenant Commander Mizer. One, the government feels we're not at
16 that stage yet, until we determine whether or not we want to object
17 to the material and relevancy standard, we're not there yet. But
18 clearly, if it's just a cleared defense counsel going to speak to
19 him, overcoming all of our other objections that we stated that will
20 be less of a concern, but that certainly is not the issue that we
21 would face in regards to live testimony.

22 MJ [CAPT ALLRED]: Okay, well, let's talk about live testimony.
23 Why wouldn't it be adequate since this testimony is going to taken

1 down in the SCIF, to have the glass walls and the time delays, so
2 that somebody who has the button can kill audio if there is an
3 inadvertent disclosure--or not an inadvertent, but an unanticipated
4 but classified disclosure?

5 CTC [MR. TRIVETT]: Yes, sir. At first blush, it may appear to
6 be a better similar situation to that of the arraignment that and the
7 follow-up sessions that we've had on the five 9/11 co-conspirators.
8 But the second you start digging down into it a little bit, it isn't
9 in any way the same situation. The five individuals who are being
10 tried for their roles in the 9/11 attacks need to be put on trial.
11 We need to hold them responsible for their actions, for their alleged
12 actions in regards to the 9/11 attacks.

13 There was an understanding that there will be a certain
14 inherent risks of disclosure of classified information in those cases
15 that we were going to allow if we were going to attempt to hold them
16 responsible for their actions. So, the first issue is that it was
17 unavoidable, that being said--because all of them are, per se
18 relevant to the defense. That's not where we're at clearly, in
19 regards to Mr. Hamdan and whether or not their testimony is relevant
20 to--to his case at that--this point. But that being said, even with
21 that situation where there were some inevitability, there are
22 extraordinary security provisions in place for that case that make

1 any other security provisions of the United States has ever put in
2 place for a criminal trial pale in comparison.

3 The case required the Offices of the Director of the
4 National Intelligence's concurrence, in order to allow for the joint
5 trial and a possible disclosure of information from one of the
6 accused to the other four accused. That was done specifically with
7 the understanding that all five of these accused were in the CIA
8 program. There is far less risk of the inadvertent disclosure to
9 someone who was already in the program, and presumably aware of some
10 of what goes on in the program as opposed to someone who is not in
11 that situation. And that's what we have here.

12 We have--the five detainees for the 9/11 case and this is
13 an unclassified fact as well, all are in the same camp together.
14 There is very little concern over the disclosure to anyone who is not
15 in the CIA program. The issue with Mr. Hamdan is completely
16 different. Should he hear any inadvertent disclosures by Khalid
17 Sheikh Mohammed or Walid bin Attash on specifics of the program that
18 can impact national security; he doesn't go back to Camp 7. He goes
19 back to his current detention cell and has the ability to
20 communicate, in some manner with other alien unlawful enemy
21 combatants, who may one day be released or may be able to
22 serendipitously disseminate the information in a way that has a huge
23 impact on national security of the United States.

1 Also, in the trial, every participant of the trial has a
2 TOP SECRET clearance with the codeword Kinhart. So that includes the
3 military judge, all of the prospective members, all of the defense
4 counsels, all the prosecution, and all of the paralegals. The only
5 people who do not have the TOP SECRET clearance, as we discussed
6 yesterday in the 802, are the guards. But the guards are all members
7 of the military subject to the Uniform Code of Military Justice, may
8 be disciplined if they violate and are requested to do inadvertent
9 disclosures, signing inadvertent disclosure forms at the end to swear
10 that they won't do it. This was all done, taking the Office of the
11 Director of National Intelligence agreed to allow them to be in
12 there, without the proper clearance; taking all of those prior
13 considerations into place and feeling that that was the best and only
14 way to actually prosecute the case.

15 Clearly, we don't have that in this case as well. To my
16 knowledge, all of the prospective members have not been cleared to
17 presumptive TOP SECRET clearances, I'm not even certain that the
18 military judge does. I know that there's only one member of the
19 defense counsel who does, I know the accused has not been approved in
20 any way to hear this information. And from the prosecution side, I
21 believe that there is only one as well or maybe--perhaps two.

22 MJ [CAPT ALLRED]: Well, I don't know about the security
23 clearances of the members.

1 It sounds like your greatest concern is that the accused
2 might hear this because the press and the public can be protected
3 with our kill switch. The members just like the guards could be
4 given an order to not disclose anything they might hear. And I
5 suppose we can hold a session which only Commander Mizer for the
6 defense and whoever on the prosecution side is appropriately cleared.

7 CDC [MR. SWIFT]: I will point out, Your Honor, I'm out of
8 order. But every member here holds a SECRET or TOP SECRET clearance.

9 MJ [CAPT ALLRED]: Okay, well whoever's----

10 CDC [MR. SWIFT]: Part of holding the clearance is if you're
11 given on an inadvertent disclosure at a level, we are subject to the
12 same criminal prosecutions as every member of the military. The only
13 difference is we'll be down at the federal court where we have
14 mandatory minimums. So to somehow put forth that the members here
15 who all have security clearances would disclose or not be subject to
16 similar criminal prosecution is simply false. Of course we are.

17 MJ [CAPT ALLRED]: Okay. Thank you. Thank you, point well
18 taken.

19 Please continue I bet if--I don't know if I interrupted
20 your argument or we've been covering the material you wanted to
21 cover.

22 Is there something else that is important to mention?

1 CTC [MR. TRIVETT]: The disclosure to anyone without a need to
2 know this information is a great concern to the United States. If
3 forced to characterize who would be happier with, as far as
4 inadvertent disclosure; now certainly someone who's determined to be
5 an alien unlawful enemy combatant would be pretty low on that list.
6 But that being said, sir we would ask leave of the court, should the
7 court determined that relevant and necessary after the government's
8 objection to this, if we have one, to amend or to request some type
9 of substitution or for alternative to a live testimony, where we can
10 better protect the equity, et cetera, at stake than having them
11 testify live at court.

12 MJ [CAPT ALLRED]: Okay, well for six of the eight, I don't
13 think the defense can do any better then they've done with respect to
14 the proffer because they either haven't answered the questions or the
15 defense hasn't submitted questions because of objections by other
16 counsels.

17 For two, Commander Mizer, you're prepared to turn those
18 over, those questions and answers so that the government will know
19 everything you know about what these witnesses are expected to say?

20 CDC [MR. SCHNEIDER]: If I may answer, Your Honor.

21 MJ [CAPT ALLRED]: You may, sure.

22 CDC [MR. SCHNEIDER]: We are prepared to do so as soon as you--
23 we would invite you to require us to do so.

1 MJ [CAPT ALLRED]: I require you to do so then.

2 CDC [MR. SCHNEIDER]: Will be done today.

3 MJ [CAPT ALLRED]: Okay. So that gets over the proffer hurdle
4 with respect to the two. I'm not going to rule on this today. I
5 want the government to know that I see this as relevant and necessary
6 and exculpatory evidence. And I am s--I just believe that we cannot
7 have a fair trial unless the defense has this evidence.

8 CTC [MR. TRIVETT]: And sir, when you say this evidence, are you
9 referring to all eight or only two of the six?

10 MJ [CAPT ALLRED]: I'm referring to all eight. I think the
11 proffer that the defense has offered is as good as they're going to
12 be able to get, given you know, the circumstances under which these
13 people are held, their suspicions, other obstacles to communication.
14 And so, I would like, knowing my feelings, sit down with the defense
15 and see if you can work something out.

16 I mean what might be the answer is to hold a deposition in
17 the courtroom. I don't know, you guys figure out the answer; a
18 videotaped deposition is obviously what the government is looking
19 for. I don't know what to do about excluding the accused, but
20 perhaps you can work out some solutions that will be mutually
21 acceptable without me having to figure out whose interests needs to
22 be trampled upon the most.

1 CDC [MR. SCHNEIDER]: I have a 30 second suggestion on that. I
2 think we've experienced today, about a 15 to 20-second delay in the
3 translation to the accused. Let's bump that up to 40 seconds when
4 these people testify. At least let's explore that.

5 MJ [CAPT ALLRED]: Okay, there is another possible answer if he
6 won't under--well, no; that won't work because these witnesses will
7 be speaking in Arabic. He'll understand it at the moment it's said.
8 We'll be the ones having to figure out whether it's classified or
9 not.

10 CDC [MR. SCHNEIDER]: If he can be isolated somehow. I like to--
11 --at least, I like to explore the technological ability----

12 MJ [CAPT ALLRED]: Okay, what--what----

13 CDC [MR. SCHNEIDER]: ----to delay his hearing of the answers.

14 MJ [CAPT ALLRED]: Why don't you do that? I think we've--I'm
15 not really going to let the proffer be an obstacle. I'm satisfied
16 that the defense has done the best they can to get you a proffer. I
17 don't believe they intend to disclose any classified information.
18 So, I'm not really worried about a 505 notice. But I want to be able
19 to protect your interests in inadvertent disclosure and--and I
20 appreciate that they have some very highly sensitive stuff in their
21 minds and they might blurt it out.

22 So if you can work out something with the defense that
23 satisfies both of your interests and then I won't have to figure it

1 out. But would you--is there anything else the defense can give you
2 that will help satisfy your concerns?

3 CTC [MR. TRIVETT]: Yes, sir. And the prosecution will speak to
4 the defense off-line and try to come to some conclusion. If you're
5 unable to; the government would like to be--in court to be able to
6 file our own separate procedures that----

7 MJ [CAPT ALLRED]: Absolutely, absolutely. I mean the motion
8 that you or the answer or whichever that is, you've given me here;
9 somebody gave me the protective order issued in the other trial. The
10 government drafted it. It's 20 pages long; it has lots of
11 prophylactic measures in there to make sure that there's no
12 compromise of classified information. I'm happy to have you do that
13 and put those procedures in place to protect your concerns about
14 national security and disclosure of what is admittedly, very
15 sensitive information.

16 CTC [MR. TRIVETT]: Yes, sir. May the government be heard on
17 the issue of the individuals who have not answered the questions?

18 MJ [CAPT ALLRED]: Absolutely.

19 CTC [MR. TRIVETT]: Now over the prosecution----

20 MJ [CAPT ALLRED]: Okay, you're talking about the two who have
21 been given questions but not answered.

1 CTC [MR. TRIVETT]: There are two who have been given questions
2 and not answered and there had been access issues that the defense
3 had based on representation.

4 MJ [CAPT ALLRED]: The other four.

5 CTC [MR. TRIVETT]: The other four.

6 MJ [CAPT ALLRED]: Okay, so what--are we talking all those six
7 together then?

8 CTC [MR. TRIVETT]: Yes, sir.

9 MJ [CAPT ALLRED]: Okay.

10 CTC [MR. TRIVETT]: Over prosecution objection, the military
11 judge drafted a very carefully crafted remedy to allow the defense to
12 elicit questions to some of the witnesses. Counsel for Ramsi bin al
13 Shibh specifically objected to defense having access to the client
14 and we're basing this on the defenses filings. We had no other means
15 to know this. Mr. Al Nashiri's counsel has objected to the defense
16 access to their part as Abu Faraj al Libi's counsel. Mr. al Hawsawi
17 has failed to provide written answers and Abdul Hadi al Iraqi, has
18 also failed to provide their answers. And in regards to Mr.
19 Sharqawi, only if the defense is present evidently will they allow
20 for the defense counsel to see them.

21 MJ [CAPT ALLRED]: Only if their own defense counsel.

22 CTC [MR. TRIVETT]: Correct.

1 MJ [CAPT ALLRED]: He is one of the accused in another case
2 then?

3 TC [LCDR STONE]: Mr. Sharqawi is not, sir, and the government
4 has never presented any, my understanding is that the government has
5 never presented any access issues or obstacle issues regarding Mr.
6 Sharqawi.

7 MJ [CAPT ALLRED]: Okay. So which defense counsel needs to be
8 present for that interview?

9 CTC [MR. TRIVETT]: Mr. Sharqawi's defense counsel. My
10 understanding is required and I normally go on what the defense has
11 said.

12 MJ [CAPT ALLRED]: He is charged with offenses under the
13 Military Commissions Act?

14 CTC [MR. TRIVETT]: No, sir. His habeas counsel.

15 MJ [CAPT ALLRED]: Oh, his habeas counsel.

16 CTC [MR. TRIVETT]: I'm sorry, I misunderstood the question.

17 MJ [CAPT ALLRED]: Okay.

18 CTC [MR. TRIVETT]: I misunderstood the question.

19 In regards to these other six individuals, other than
20 Khalid Sheikh Mohammed and Walid bin Attash, the defense's quest must
21 end at this point in time. They've taken the position that they
22 cannot speak directly to the individuals because they're represented.
23 That's their call. The prosecution is not going to interfere in any

1 way with that. But they used flawed statistical probability to
2 suggest that somehow because Khalid Sheikh Mohammed and Walid bin
3 Attash answered questions that were similar to the proffer, again the
4 prosecution can object to that or disagree with that because we have
5 haven't seen their answers so we will shortly--for the fact that two
6 has said something close to the proffer does not in any way indicate
7 that the other six might.

8 They were asked questions, the military judge to allow for
9 the defense assess them. They've chosen not to do it. So again
10 this----

11 MJ [CAPT ALLRED]: Wait a minute; they would ask questions, the
12 two who didn't respond.

13 CTC [MR. TRIVETT]: They had the abilities to ask questions, two
14 specifically were given questions, the other four----

15 MJ [CAPT ALLRED]: In that case, Mr. Schneider indicated they
16 were representing--respecting that request from counsel.

17 TC [LCDR STONE]: Yes, sir. Yes sir.

18 So to summarize the prosecution's position, now that the
19 military judge has ordered for the defense to give answers to the
20 questions to the prosecution, we will look at those answers. We will
21 determine if we want to make further objections based on the
22 relevance and necessity. I know the military judge has given his
23 opinion and he believes that it's relevant and necessary and maybe

1 possibly exculpatory. The prosecution will probably like to put
2 forth its theory of the case and its theory as to why this isn't
3 exculpatory as to the charges. After that is decided, the
4 prosecution will work on crafting some type of adequate substitute or
5 ability to get what the defense needs in a way that's not going to
6 impact national security by allowing for live testimony of those
7 accused [sic].

8 MJ [CAPT ALLRED]: Okay. I appreciate your--well I appreciate
9 seeing you, that you're really alive, first of all. I mentioned
10 before that I wasn't sure you were there.

11 CTC [MR. TRIVETT]: I was held in storage so long; it was
12 concern that I may expire.

13 MJ [CAPT ALLRED]: Okay, thank you.

14 CTC [MR. TRIVETT]: Thank you, sir.

15 MJ [CAPT ALLRED]: Mr. Schneider?

16 CDC [MR. SCHNEIDER]: Just one point of clarification.

17 MJ [CAPT ALLRED]: Jumping to your feet.

18 CDC [MR. SCHNEIDER]: Pardon me?

19 MJ [CAPT ALLRED]: You're jumping to your feet.

20 CDC [MR. SCHNEIDER]: I am. I don't intend to reargue even
21 though that sounds like the speediest motion for reconsideration I've
22 ever heard, I thought your observations went to all eight not just
23 two. Let me clarify one thing, which may be confusing. We have not

1 been told by any high-value detainee or his counsel that they will
2 not answer our questions or testify. What we've been told by several
3 counsel including Mr. Chandler on behalf of Mr. Al-Sharqawi, I don't
4 want you meeting with him outside my presence. We've been told
5 variously; "I'll discuss with my client your questions, your request
6 for testimony." So don't be under the impression that they said that
7 he will not testify.

8 MJ [CAPT ALLRED]: Had those habeas counsel been down here to
9 meet with their clients?

10 CDC [MR. SCHNEIDER]: Mr. Chandler has not been able to be
11 present on the island at the time when we will be present. I think
12 he's probably been down.

13 MJ [CAPT ALLRED]: I mean has he taken your questions in to his
14 client to discuss them even though you're not here?

15 CDC [MR. SCHNEIDER]: I don't know.

16 MJ [CAPT ALLRED]: I mean, I denied an earlier motion for relief
17 because it appeared to me that there are adequate procedures in place
18 for habeas counsel to come whenever they want.

19 CDC [MR. SCHNEIDER]: We communicated in writing with every
20 lawyer we know had any relationship to any of these witnesses last
21 week and said we intend to call them to testify. I think we will be
22 getting some activities in responses. We have received several phone
23 calls in the direction of arranging for their witnesses--their

1 clients, our witnesses to be available. I just don't want you to
2 have the impression that anyone has said no. They just said don't
3 meet with them outside my presence.

4 MJ [CAPT ALLRED]: I appreciate that, all of you--probably are
5 giving more credit to my memory than it deserves. So I need to be
6 reminded from time to time.

7 Okay, well, I'll just hold this motion in abeyance. It
8 looks like there is not a lot of activity going on; we may get some
9 written questions and written answers from the six or the two in the
10 next few days or weeks. I hope you'll tell those people that you're
11 going to have to give their questions and answers to the government,
12 so they will have a proffer that they can be comfortable with. And
13 then I want you to work on security arrangements and whatnots, the
14 satisfactory to the government and it gives the defense the benefit
15 of the testimony, whatever relevant testimony might be out there to
16 be had. Deliver your ideas it may work. If that's satisfactory to
17 the defense to somehow isolate the accused when they testify or
18 whatever, but I don't understand all the equities and I certainly
19 don't appreciate them to the level that Mr. Trivett does; so why
20 don't we set this aside and let you see if you can resolve it on
21 mutually acceptable terms?

22 CDC [MR. SCHNEIDER]: Very well; may I re-introduce Mr.
23 McMillan?

1 MJ [CAPT ALLRED]: I know Mr. McMillan. He's finally got his
2 PowerPoint?

3 CDC [MR. MCMILLAN]: My PowerPoint has arrived. I appreciate
4 the patience of the court.

5 MJ [CAPT ALLRED]: We're moving to what motion now?

6 CDC [MR. MCMILLAN]: This would be D-012, this supplemental
7 authority on the ex-post facto motion; essentially a discussion of
8 the Supreme Court's recent decision in *Boumediene v. Bush* and how
9 that applies to this case.

10 While we have linked it to D-012, the pending motion to
11 dismiss for lack of subject matter jurisdiction and the ex-post facto
12 issues, *Boumediene* applies to a number of the motions that have been
13 recently filed. Accordingly the comments offered here will bear
14 directly on the court's consideration of quite a few of the motions
15 it's got before it.

16 How does *Boumediene* apply here at Guantanamo?

17 The short answer is it implies clearly that Constitutional
18 protections are extended to Guantanamo Bay and can be invoked by the
19 defendant, Mr. Hamdan. There is a very specific holding in
20 *Boumediene v. Bush* and that specific holding, the prosecution asked
21 to be looked at in isolation without the inquiring to the premise
22 behind that holding.

23 MJ [CAPT ALLRED]: Do you need some time?

1 LN1 LINDEE: I need Sergeant McDonald to come in, sir.

2 MJ [CAPT ALLRED]: Sergeant McDonald. Where--is Sergeant
3 McDonald within the sound of my voice? We need some technical
4 horsepower here. **[Courtroom tech enters the courtroom.]** Sergeant
5 McDonald's understudy or supervisor has entered the courtroom.

6 COURTROOM TECH: I only play one on TV **[assisting LN1 Lindee
7 with the technology equipment].**

8 MJ [CAPT ALLRED]: It takes my computer at home about 20 minutes
9 to come to life.

10 Do we need a recess?

11 CDC [MR. MCMILLAN]: Your Honor, I can proceed----

12 MJ [CAPT ALLRED]: Okay.

13 CDC [MR. MCMILLAN]: ----without the PowerPoint. Will it be----
14 **[The courtroom technology was working for Mr. McMillan's argument,
15 and the courtroom technician withdrew from the courtroom.]**

16 MJ [CAPT ALLRED]: Thank you, well done.

17 CDC [MR. MCMILLAN]: I would ask, Your Honor, that the slides to
18 be exhibited to the gallery. It doesn't contain any evidence.

19 MJ [CAPT ALLRED]: Very well, you may do that--may broadcast to
20 the gallery.

21 CDC [MR. MCMILLAN]: So as I was saying, Your Honor, this
22 specific holding in *Boumediene* is--in Section 7 of the M.C.A. is an
23 unconstitutional suspension of the writ of *habeas corpus*.

1 Prosecution would ask that this court with Cognizance of the--of the
2 opinion ended at that level. However, it is necessary to go the
3 premise of the *Boumediene*, which is the fundamental Constitutional
4 rights and in its own power apply to Guantanamo.

5 The premise of the *Boumediene* decision is that the
6 suspension clause of the Constitution stands in Guantanamo. It is
7 the fundamental right, accordingly; it is clearly implied that other
8 fundamental rights apply. The court stated that the issue of the
9 Constitution's extraterritorial application had been addressed by the
10 Court on many occasions in the past and it referred back to the
11 *Insular Cases*.

12 The *Insular Cases* held as the Court described that the
13 Constitution has independent force in these foreign territories under
14 U.S. control; a force not contingent upon acts of legislative grace.

15 As the Court made clear, the real issue in the *Insular*
16 *Cases* was not whether the Constitution extended overseas but rather
17 which of its provisions were applicable by way of limitation upon the
18 exercise of executive and legislative power in the context of a
19 specific circumstances.

20 The Court distinguished in the *Insular Cases* between
21 incorporated territories and unincorporated territories. The
22 incorporated territories were those intended for admission to
23 statehood. The incorporated territories were not intended for

1 statehood. In the incorporated territories, the Constitution applied
2 in full. In the unincorporated territories about what the Court
3 explained, it had previously used a functional approach to access
4 which specific provisions of the Constitution would apply. And the
5 holding of those cases was that fundamental rights and absolute
6 prohibitions set out in the Constitution applied in those
7 unincorporated territories.

8 The *Boumediene* case held that as early as Balzac, one of
9 the *Insular Cases* in 1922, the Court took for granted that even in
10 unincorporated territories; the government of the United States was
11 bound to provide noncitizen inhabitants with guarantees of certain
12 fundamental personal rights declared in the Constitution. This
13 second slide then--this next slide then describes the prohibitions;
14 fundamental rights on the one hand, prohibitions on the other. The
15 court stated that the Constitution of--grants Congress the power to
16 acquire, dispose of, and govern territory but not the power to decide
17 when and where the Constitution applies.

18 Even when the United States acts outside its borders, its
19 powers are not absolute and unlimited, but are subject to such
20 restrictions are expressed in the Constitution.

21 For example, in *Boumediene*, the issue was a separation of
22 powers issue. And the court interpreted the Great Rift to be an
23 essential mechanism supporting the separation of powers. The Court

1 in *Boumediene* made clear that foreign nationals in this precise
2 location, held as alleged alien combatants at Guantanamo Bay, would
3 have the power of invoking the separation of powers principles in any
4 American court in this location.

5 The Court in *Boumediene* showed little deference to the
6 political branches when it came to the protection of fundamental
7 rights or the enforcement of absolute prohibitions. It wrote a
8 strong separation of powers opinion. It emphasized the role of the
9 Court in enforcing constitutional limits, even in a highly sensitive
10 area such as national security and even in the face of a detailed
11 congressional scheme setting out a program for review of combatant
12 status.

13 The Court stated that it is not for the political branches
14 to "say what the law is." Citing back to the 1803 decision, *Marbury*
15 *versus Madison*, to allow that to occur the Court said, "Would permit
16 a striking anomaly in our tripartite system of government. It would
17 offend basic principles of separation of powers." The Court noted,
18 very tellingly, that the scope of a constitutional provision must not
19 be subject to the manipulation by those whose powers it is designed
20 to restrain. The Court clearly suggested that the placement of
21 detainees at Guantanamo, outside the reach of U.S. District Court
22 jurisdictions; it regarded as a manipulative effort to put the

1 political branches beyond the reach of the law allowing them to "say
2 what the law is." And it emphatically rejected that position.

3 Stating from questions involving formal sovereignty and
4 territorial governments is one thing that would reflect an
5 appropriate deference to the political branches, but to hold that the
6 political branches have the power to switch the Constitution on and
7 off at will is quite another.

8 Now, when you look at the *Insular Cases* that were relied
9 upon in *Boumediene*, we see an express recognition of the ex post
10 facto clause as an absolute prohibition that applies in all places
11 where the U.S. exercised exclusive control.

12 "There is a clear distinction", said the Supreme Court in
13 the *Downes* case, "between such prohibitions as go to the very root of
14 the power of Congress to act at all irrespective of time and place
15 and such as are operative only throughout the United States." What
16 was being distinguished here in *Downes v. Bidwell* was the specific
17 issue of uniform duties in coast and excise taxes, which were of the
18 sort that were only operative throughout the United States; not
19 fundamental rights. And a series of fundamental rights that the
20 Court identified as operating in all places and all times
21 irrespective of time and location. Thus the Court said, "When the
22 Constitution declares that no bill of attainder or ex post facto law
23 shall be passed and that no title of nobility shall be granted," it

1 goes to the competency of Congress to pass the bill of that
2 description entirely.

3 There is a list of three specific prohibitions that apply
4 anywhere that the United States Government acts. The President and
5 the Congress of the United States have the power to act only under
6 the United States Constitution. These absolute prohibitions apply in
7 foreign territories under U.S. control.

8 Again in *Downes*, we see a concurring opinion of Justice
9 White, an opinion that he authored of the majority in *Boumediene*
10 relied heavily upon, the statement that there are general
11 prohibitions in the Constitution which are not near regulations as to
12 forum and manner in which a power may be exercised; again,
13 contrasting with the uniformed taxes requirement. But which rather
14 are an absolute denial of all authority to act under any
15 circumstances for conditions to do a certain thing.

16 Some of the other natural rights enforced in the
17 Constitution by such prohibitions in the *Downes* case were identified
18 in the opinion including free access to courts of justice and since
19 that was the one that was issued--that issued *Boumediene*, with the
20 habeas review. The following two, however are directly applicable in
21 this case with trial by military commission; due process of law and
22 equal protection of the laws.

1 Now, how did the Court arrive at the conclusion that these
2 fundamental rights apply at Guantanamo?

3 It employed a functional approach. It reviewed its own
4 extraterritorial jurisprudence and it found a common thread that
5 united a series of cases. As the Court said, "the common thread
6 uniting the *Insular Cases*, *Eisentrager*, and *Reid*, was the idea that
7 questions of extra-territoriality turn on objective factors and
8 practical concerns', not formalism; not the question of whether the
9 U.S. is sovereign over a particular region or not, rather a series of
10 practical concerns. If we look specifically at some of the cases
11 that were discussed in *Boumediene*, we see the kinds of objective
12 factors and practical concerns that were an issue.

13 In the earliest of the cases discussed in *In re Ross*, a
14 British subject was being held for murder in Ja--and tried in a U.S.
15 consular court in Japan. The Court held in *In re Ross* that he could
16 be tried for that criminal offense by a consular court, and
17 *Boumediene* essentially acknowledged that what was at issue in *In re*
18 *Ross* was a practical assessment of the best way in which justice
19 could be served in Japan in the 1890s for Americans and those under
20 the protection of the United States, which was the case with the
21 petitioner in *In re Ross*. The assessment made at that time was that
22 a consular court in Japan was the most efficient and effective way to

1 ensure justice for U.S. citizens and those under American protection
2 in that locality, at that time.

3 In the *Insular Cases*, the Court was confronted with a pre-
4 existing legal structure that had been imported by the Spanish, who
5 were the colonial overlords of places recently acquired by the United
6 States; the Philippines, Puerto Rico. In those cases, the United
7 States was the sole power controlling that territory and in that
8 context, fundamental rights and absolute prohibitions, laid out in
9 the Constitution, could be and were applied.

10 In *Eisentrager* however, which the government very heavily
11 relies on, *Eisentrager*, the issue was Landsford prison in Germany
12 occupied at the end of World War II and as the court made clear in
13 *Boumediene*, that factual scenario, the conditions present there are
14 vastly different from those present here at Guantanamo. Perhaps the
15 key to *Eisentrager* is that you had overlapping jurisdictions by
16 multiple powers. The four Allied Powers all had responsibility for
17 the occupied zones and as the Court said, the United States was
18 answerable to its Allies for processes that it put in place for the
19 administration of justice in that location.

20 The government simply will not let go of *Eisentrager*
21 despite *Rasul*, and now despite *Boumediene*. It's very, very clear
22 that *Eisentrager* has been confined to its facts and the Supreme Court

1 has said clearly that using a functional approach, constitutional
2 rights apply here in a matter that did not apply in *Eisentrager*.

3 The last three in which we see this functional approach
4 applied include Reid, in the late 1950s. This involves U.S.
5 civilians on military bases abroad. Here the Supreme Court said it
6 was practicable and there was nothing anomalous about extending
7 constitutional rights in that context and it did so.

8 In *Verdugo*, which is also relied on heavily by the
9 prosecution, it was held impracticable to extend Fourth Amendment
10 rights to a Mexican citizen, whose Mexican residence was searched by
11 Mexican authorities in Mexico. Here again, you have a jurisdiction
12 with its own police powers and legal traditions has the primary
13 responsibility operating in that locale to presume to extend the
14 requirements of the U.S. Constitution where a sovereign state is
15 exercising its law enforcement powers would be presumptuous. And the
16 Constitution does not require that, however, in *Verdugo*, the Court
17 said, there's no doubt that once this Mexican national is in a U.S.
18 criminal court, the protections of due process under the Fifth
19 Amendment and trial protections under the Sixth Amendment are
20 enforceable and will be provided.

21 Now, finally, we have *Boumediene* dealing with this specific
22 location, holding that there are few practical barriers to the
23 extension of constitutional rights here and for all practical

1 purposes, Guantanamo is not abroad but is under the complete and
2 indefinite control of the United States. Accordingly, constitutional
3 rights, at least those that impose structural limits on power and
4 protect fundamental personal rights, must apply.

5 The court--my final point Your Honor, is that the
6 prosecution would ask this court to do what the government did in
7 *Rasul*. In *Rasul*, the Supreme Court of the United States held that
8 the habeas statute was consistent with the historical reach of the
9 Writ. Nevertheless, its specific holding was that the habeas statute
10 extended habeas rights to Guantanamo.

11 The government insists that upon the change of the statute
12 that we can ignore the Court's statement that it is statutory
13 interpretation was consistent with the constitutional scope. The
14 government is taking precisely the same position here with respect to
15 *Boumediene* asking that you only look at the very narrow position that
16 section 7 of the M.C.A. is unconstitutional and then stop your
17 inquiry, not look at the premise of the whole thing, the basis for
18 the holding, which is that the constitutional rights, in this case
19 or--in the *Boumediene* case, the right of habeas corpus applies
20 abroad, in this context using the functional approach.

21 Thank you, Your Honor. If there are questions I will be
22 happy to address it.

1 MJ [CAPT ALLRED]: No, thank you. Appreciate your analysis of
2 the law and your argument. As a matter of fact, I think let's take a
3 recess before we continue. We have, if I was not mistaken, we were
4 going to take the government's argument on this motion and then the
5 equal protection motion and call it a day today.

6 So why don't we take a recess now and come back and wrap
7 that up, shall we?

8 CTC [MR. TRIVETT]: Yes, sir.

9 MJ [CAPT ALLRED]: 20 minutes will be enough or half an hour,
10 something like that? **[Counsels nodded in response.]** Okay, we'll be
11 in recess.

12 **[The R.M.C. 803 session recessed at 1033, 14 July 2008.]**

13 **[The R.M.C. 803 session was called to order at 1102, 14 July 2008.]**

14 MJ [CAPT ALLRED]: The court's called to order.

15 Let's see, we're ready to hear the government's argument on
16 the ex post facto motion.

17 CTC [MR. TRIVETT]: **[Moving to the podium.]** Sir, the issue of
18 whether the constitutional ex post facto provisions are violated in
19 the charges alleged in the means of conspiracy material support only
20 need to determine the effect of the military judge finds that a
21 conspiracy and material support do not exist the violations of the
22 law of war, for if they did, there is no ex post facto problems. And

1 the military judge need not decide the issue of whether or not there
2 is constitutional violation in ex post facto clause.

3 This is commonly referred to as the Constitutional
4 Avoidance Doctrine. And the prosecution proposes that the military
5 judge determine that both conspiracy and material support did exist.
6 And although the prosecution has both briefed this issue extensively,
7 as well as argued extensively on the existence of conspiracy in the
8 conduct that material support for terrorism is actually punished, I
9 will not reiterate that in detail, those are in the briefs. But just
10 very briefly in regards to the conspiracy.

11 The United States knows that the Nazi saboteurs during
12 World War II and after World War II were charged with conspiracy;
13 Colonel Winthrop listed conspiracy as an offense in his treatise; and
14 the Army Field Manual has included conspiracy in violation of the law
15 of war since the 1950s. These acts were hardly innocent when done
16 which is required under the ex post facto considerations. And again,
17 we note the military judge can come to the conclusion on the
18 existence of those offenses without ever having to reach the
19 constitutional implications.

20 In regards to material support for terrorism we quote
21 William Shakespeare, "A rose by any other name would smell as sweet."
22 The conduct that material support attempts to criminalize has always
23 been punishable. While you may not be able to find a specific

1 instance in which the prosecution has charged someone with the
2 specific offense, of the material support for terrorism all of the
3 conduct implicated within that charge, has traditionally been tried
4 and therefore is not run a foul by ex post facto proceeds either.
5 The defense sites to *Boumediene*, the recent decision by the Supreme
6 Court as extending banality of constitutional rights to the detainees
7 at Guantanamo Bay. This is contrary to the court's own words.

8 MJ [CAPT ALLRED]: To this court or to some other court?

9 CTC [MR. TRIVETT]: The Supreme Court's own words.

10 And to quote from the *Boumediene* decision, "Our decision
11 today holds only that the petitioners before us are entitled to seek
12 the writ; that the DTA review procedures are an inadequate substitute
13 for habeas corpus; and that at the petitioners in these cases need
14 not exhaust the review procedures in the Court of Appeals before
15 proceeding with their habeas actions in the District Court. The only
16 law that we identify as unconstitutional is Military Commissions Act
17 section 7, 28 U.S.C.A. Section 2241(e)."

18 *Boumediene* rested specifically on the issue of individuals
19 who are being held based on only the Combatant Status Review Tribunal
20 that they have received. As such that they had very little
21 similarity between Mr. Hamdan in this case. The accused was found by
22 the military judge to be an enemy--enemy unlawful combatant after a
23 full-blown adversarial process. The accused is currently being

1 charged with war crimes before a military commission that affords the
2 accused more rights than any Military Tribunal in the history of
3 warfare. And that includes the post World War II commissions that
4 were cited by the Supreme Court in *Boumediene*, specifically *ex parte*
5 *Quirin* and the *Yamashita* case, which the Supreme Court acknowledged
6 in *Boumediene* that habeas corpus review may be even more
7 circumscribed if it were reviewing a judgment of the military
8 commission as opposed to a CSRT.

9 *Boumediene* is more important for what it did not say than
10 for what it did say. And it did not disturb in any way, prior
11 Supreme Court precedent, that determined that the Fifth Amendment and
12 the other individual rights that was secured by the Constitution, do
13 not apply to aliens lacking any voluntary connection to the United
14 States. And that's the standards that the accused unquestioningly
15 falls under.

16 This is laid out in more detail in our briefs, but we would
17 cite the military judge to the *Verdugo* case and *Johnson v.*
18 *Eisentrager* for that proposition. If the accused were found to have
19 Fifth Amendment rights, he would have more protection afforded to him
20 than our own soldiers. *Eisentrager* was in no way overruled by the
21 Supreme Court and is rather distinguished by the fact that
22 *Eisentrager* did not dispute--that the folks in the *Eisentrager* case

1 did not despite their own status as alien combatants, whereas the
2 *Boumediene* petitioners did.

3 Any other reading would be a complete repudiation of long-
4 standing precedent in the Supreme Court and you would think the
5 Supreme Court would have explicitly made clear to everyone that they
6 were overturning the prior precedents, and they didn't, Your Honor.

7 Thank you.

8 MJ [CAPT ALLRED]: Okay. This issue has been briefed at some
9 length and I do have your--all your briefs from when we argued the ex
10 post facto motion some time ago. So, I guess I'll go back and return
11 to those if I have any questions.

12 Are we ready to turn our attention then to the equal
13 protection, D-043?

14 CDC [MR. MCMILLAN]: **[Moving to the podium.]** Your Honor, I
15 would request again that the slides be published to the gallery and
16 to the press behind the bar as well.

17 MJ [CAPT ALLRED]: Very well.

18 CDC [MR. MCMILLAN]: D-043, Your Honor is a motion to reconsider
19 the jurisdictional ruling that this court made in December of 19--of
20 2007. The ruling--the defense believes should be reconsidered
21 because it was based in part on the appellate decision of *Boumediene*
22 that has now been overruled by the Supreme Court and particularly

1 the--I understand, Your Honor, that the gallery monitors are not on.
2 I'm not sure if there's any ability to illuminate those.

3 MJ [CAPT ALLRED]: It's up here. I don't know how else to fix
4 it.

5 Why don't you go ahead and make your argument and we'll try
6 to fix that at the next opportunity?

7 CDC [MR. MCMILLAN]: As I was saying, the appellate court
8 decision has been reversed and it is the defense's position that the
9 Equal Protection Clause of the Constitution does apply after the
10 *Boumediene* decision, being a fundamental right that the functional
11 approach suggests or indicates applies at Guantanamo. The Equal
12 Protection Clause set out in the 14th Amendment guarantees the equal
13 protection of the laws. The 14th Amendment of course applies to the
14 states; however it's well recognized that the Fifth Amendment which
15 applies to federal government, its Due Process Clause incorporates an
16 equal protection guarantee. It's also not a point of dispute between
17 the defense and prosecution that the Due Process Clause protects
18 persons not just citizens. This slide quotes the United States
19 Supreme Court indicating that the concept of equal justice is served
20 by the Fifth Amendment's guarantee of Due Process.

21 The next slide, likewise, corroborates or establishes the
22 Equal Protection obligations imposed by the Fifth and 14th Amendments
23 have been deemed to be indistinguishable. The same jurisprudence is

1 applied to the federal government and to the state governments, with
2 the possible exception, as I'll come to momentarily, in two areas of
3 law. And neither of them are relevant here. The two areas in which
4 there could be a difference between the Equal Protection limits on
5 state versus federal power relate to government benefits on the one
6 hand and immigration and naturalization issues on the other hand.

7 As early as the 1880s in the *Yick Wo* decision, the
8 principle that the due process clause and the equal protection clause
9 rather applied to all persons was established. The last line of this
10 quote, I think, is particularly pertinent to the Military Commissions
11 Act which is before the court on this motion. "The equal protection
12 of the laws is a pledge of the protection of equal laws." And the
13 defense submits that the M.C.A. is not equal in providing protections
14 in criminal process and therefore offends the equal protection
15 guarantees of the Due Process Clause.

16 The more recent cases, the Court has reiterated--the
17 Supreme Court has reiterated that the Fifth Amendment protects all
18 persons from deprivations of life, liberty, or property without due
19 process of law even--as it set out in the *Matthews* case--even those
20 whose presence in the country is unlawful, involuntary or transitory
21 they are likewise entitled to that constitutional protection.

22 *Boumediene* established that for all practical purposes,
23 Guantanamo is not abroad. It is within the constant jurisdiction of

1 the United States. Consequently, this language would apply here as
2 well.

3 In the *Insular Cases*, which again were heavily relied upon
4 by the court in *Boumediene*, we see language stating that "The
5 Constitution of the United States is in force wherever and whenever
6 the sovereign power of that government is exerted." Using the
7 functional approach laid out in *Boumediene* as I mentioned it's a
8 question of which specific provisions, not whether constitutional
9 provisions apply, fundamental rights and absolute prohibitions. Ex
10 post facto falls in to the absolute prohibition category, equal
11 protection in criminal process falls into the fundamental rights
12 category. This slide, we've seen already, we've noted already that
13 in *Downes v. Bidwell*, one of the earliest of the *Insular Cases*, both
14 Due Process of Law and Equal Protection of the Laws are identified as
15 natural rights.

16 They are, the Court said in *Bidwell*, indispensable to free
17 government.

18 Recall that historically at the moment the insular cases
19 were decided the United States and the Supreme Court was confronted
20 with a question of some significance philosophically. Which is, will
21 the United States in acquiring an overseas territory, act as an
22 imperial overlord, objecting residents of those territories to a
23 second-class status; denying them of the kind of legal protections

1 which are the essence of the American idea; the American idea of
2 political and legal equality? And in the *Insular Cases*, the courts
3 emphatically said, "We are not an imperial power. We are not going
4 to relegate others to the kind of second-class status that we
5 ourselves rose in rebellion against when we were relegated to such
6 status in the late 18th century." The Equal Protection Clause
7 directs that all persons similarly circumstanced shall be treated
8 alike.

9 Now, under Equal Protection jurisprudence, there are two
10 levels at least, of scrutiny which laws are subject to. Strict
11 scrutiny, which is a very demanding examination and one which is
12 rarely survived; and rational basis scrutiny or rational basis review
13 which is a very deferential level of review and almost always leads
14 to the upholding of the a law under consideration.

15 It's well established that strict scrutiny is applied when
16 laws impact fundamental rights or apply a suspect classification when
17 they discriminate between peoples on the basis of what has been
18 recognized as a suspect classification. Strict scrutiny means that
19 the government must show a compelling interest and it's—it's method
20 of addressing the compelling interest must be narrowly tailored to
21 serve that compelling interest.

22 In this case, the M.C.A.'s different treatment in the
23 criminal process cannot survive strict scrutiny. The M.C.A., as this

1 Commission has already found, affords an inferior level of protection
2 to criminal defendants in front of the commission than would be
3 afforded to criminal defendants in any other American court.

4 In *Clark v. Jeter*, the Supreme Court stated that
5 classifications affecting fundamental rights are given the most
6 exacting scrutiny. This slide reiterates the point that strict
7 scrutiny requires a showing of a compelling government interest and
8 the least burdensome means to accomplish that interest. The M.C.A.
9 cannot survive that level of review because the criminal defendants
10 in front of this commission could as well be tried in front of--
11 either a court-martial or the United States District Court. And that
12 could serve the interest of justice.

13 The fundamental rights that we've talked about in the
14 *Downes v. Bidwell* case include an express reference to equal
15 protection of the laws. The Supreme Court refers to that list of
16 rights as natural rights, indispensable to free government. The key
17 point on this motion is, is equality in a criminal process a
18 fundamental right, or not.

19 The defense submits that in all cases in front of the
20 United States Supreme Court equality in a criminal process has been
21 subject to strict scrutiny as a fundamental right and upheld in all
22 cases.

1 *Griffin v. Illinois* is a case that sets this out perhaps
2 most explicitly. Our Constitutional guarantees of due process and
3 equal protection, both call for procedures in criminal trials which
4 allow no invidious discriminations between persons and different
5 groups of persons. And this quote in particular, I think captures
6 what is carved in stone above the entrance of the Supreme Court of
7 the United States, "Equal justice under law as an absolute bedrock
8 principal of American law and of the entire American political
9 culture." Of both equal protection and due process, the Supreme
10 Court said, "emphasized the central aim of our entire judicial
11 system, all people charged with crime must so far as the law is
12 concerned, stand on an equality before the bar of justice in every
13 American court." I don't need to linger, I believe, on the different
14 and inferior protections afforded to criminal defendants in a
15 military commission as drafted by the M.C.A.

16 On this slide, we see three examples. Evidence extracted
17 through coercion apparently is admissible under the M.C.A. if certain
18 requirements are satisfied. Likewise, hearsay evidence is admissible
19 on a similar standards to non-hearsay evidence imposing a burden on
20 the party resisting that evidence to show unreliability. This is a
21 significant departure from rules of evidence that would be applied in
22 any other American court and it is prejudicial to criminal
23 defendants.

1 Finally under the M.C.A., criminal defendants are purported
2 to be denied the right to invoke the Geneva conventions as a source
3 of rights. There is nothing similar to that type of legal strip of
4 all rights that would apply to a defendant in a civilian court or a
5 court-martial. This court, as I've mentioned, has already noted in a
6 context of self-incrimination that Congress has indeed provided for a
7 lesser level of protection for criminal defendants in a commissions
8 process and that this is a result that is at odds with the balance of
9 the American jurisprudence.

10 The prosecution does not attempt to deny that there is a
11 different and inferior level of criminal prosecu--protection afforded
12 to the defendants.

13 The other basis for strict scrutiny is the use of a suspect
14 classification. The U.S. Supreme Court has noted that
15 classifications based on alienage, like those based on nationality or
16 race, are inherently suspect and subject to close judicial scrutiny.
17 Now, the prosecution has noted, as has the defense in its briefing,
18 that that level of strict scrutiny does not apply in these two areas
19 of the Court's jurisprudence, that the federal government can show--
20 can differentiate between citizens and noncitizens when it comes to
21 immigration and naturalization matters or it comes to government
22 benefits.

1 Indeed, one of the cases that the prosecution cites in
2 opposition, the *Rodriguez-Silva* case, a Fifth Circuit decision is a
3 deportation proceeding in which strict scrutiny is not applied,
4 indeed, not rational basis scrutiny is needed to be applied, because
5 the powers of the federal government are plenary when it comes to
6 immigration and naturalization cases. But that case, indeed supports
7 the defense position, the language of the case, well, let me read to
8 you.

9 "For example," the court said, "an alien may not be
10 punished criminally without the same process of law that would be due
11 to a citizen of the United States", citing to the *Wong Wing* decision
12 from the 1890s. In *Wong Wing*, there was a deportation proceeding
13 joined to a criminal sentence and the Supreme Court in that case
14 affirmed the deportation order as within the powers of the federal
15 government to control immigration and naturalization, but struck down
16 the criminal sentence because the summary process that had been
17 provided to the four aliens at issue in that case, did not conform to
18 the constitutional requirements; did not--they were not the same
19 criminal processes as were used involving citizens and therefore
20 equal protection was violated. That case, accordingly, clearly shows
21 the difference.

22 Some of the other equal protection cases relating to
23 criminal processes are outlined on this slide. What they illustrate

1 is that far less serious impositions on equality before the bar of
2 justice have been subject to strict scrutiny and have failed to
3 survive, far less serious and then the inequalities present here,
4 which include the qualities on things like self-incrimination,
5 coercion and the other issues that we've identified; the use of
6 hearsay, the stripping of legal rights and the ability to invoke
7 those rights.

8 In *Griffin*, the issue was whether or not indigent
9 defendants could get access to court transcripts. The holding was
10 that the regulation which would not provide--which would require
11 payment for those transfers was unconstitutional as a violation of
12 the equal protection. In *Douglas versus California*, the issue was
13 counsel, not at the trial level but at the appellate level, and
14 again, the statute which allowed the court to exercise its discretion
15 as to whether or not to extend counsel or afford counsel was deemed
16 unconstitutional. And finally in *MLB versus SLJ*, we had a record
17 preparation fee which was necessary for an appeal in a custody
18 termination decision, and this wasn't even a criminal case. Here,
19 strict scrutiny was applied because of the gravity of the interests
20 at stake, termination of parental custody and on equal protection
21 grounds. The statute requiring payment of that fee was deemed to
22 offend equal protection, introducing a--sort of a class-based barrier
23 between rich and poor as to how those rights should be protected.

1 The methods or the opposition, I suppose that has been put
2 forward by prosecution to this motion, is that *Bush v.*--the
3 *Boumediene V. Bush* must be read to very, very narrowly. It ignores
4 the entire premise of the decision in constitutional rights extend,
5 at lease fundamental constitutional rights.

6 As we heard a few moments ago, the prosecution points to
7 *Quirin* and *Yamashita* as precedent for military commissions. What is
8 relevant in those cases is that from the *Boumediene* court's position,
9 enemy aliens were afforded the right of habeas corpus to challenge
10 the legality of their--of their detention and criminal process. And
11 indeed, the Supreme Court in *Quirin* interrupted the criminal process
12 in order to review the legality of that decision.

13 The other point, I think that bears mentioning in the
14 prosecution opposition is that the M.C.A., as an act of Congress
15 under the last in time rule, can supersede or trump international
16 law, customary international law or treaty base law; a point that is
17 not contested. But what the prosecution fails to recognize is the
18 issue isn't a last in time issue; the issue is a statue that strips
19 rights guaranteed by treaty and customary international law; rights
20 that the Supreme Court has already acknowledged in this case, to
21 protect a defendant and that poses--that poses an equal protection--a
22 separation of powers issue. Can Congress come in, and ignore a final
23 holding of the Supreme Court about Mr. Hamdan being protected by

1 Common Article 3 with a retroactive law, stripping him of those
2 protections? That presents exactly the kind of separation of powers
3 issue that the *Boumediene* decision addresses very, very strongly, and
4 very forthrightly.

5 If the court has any questions I'd be happy to address
6 them.

7 MJ [CAPT ALLRED]: Actually, I think I'll look--hear the
8 government's brief first. Maybe they'll respond to some of the
9 points you made and satisfy my questions.

10 Mr. Trivett, you're the man today?

11 CTC [MR. TRIVETT]: Yes, sir.

12 Sir, the Fifth Amendment, Equal Protection Clause does not
13 apply to the accused. *Boumediene* did not make it so. I would ask
14 the court just to take note of what the prosecution has argued in the
15 last piece in regards to Boumediene. I will not waste the courts
16 time going through that again. However, I did want to address some
17 specific issues that defense brought out, specifically.

18 The defense characterized the classification of the accused
19 as that of an alien. We think that is inaccurate. While he is no
20 doubt an alien, he is different in the fact that he is an alien
21 unlawful enemy combatant of the United States; that makes it
22 completely different than trying to discriminate against someone in

1 this case, under alienage. The defense counsel specifically brought
2 up the issue of plenary jurisdiction of the federal government.

3 MJ [CAPT ALLRED]: The issues of what?

4 CTC [MR. TRIVETT]: Plenary jurisdiction of the federal
5 government in regards to immigration. **[Military judge acknowledged**
6 **answer.]** We would note that it's also a function of the federal
7 government to wage war and to wage war successfully. And to have the
8 ability to do that, if the government cannot discriminate in any way
9 against--a sworn enemy of us, whether it be to kill them or to
10 discipline them for violating the laws of war, while they're waging
11 war against us, the federal government would be unable to wage war
12 successfully.

13 Should the court determine that the Equal Protection Clause
14 does apply, the prosecution proposes that the rational basis test is
15 the correct test, and there could never be a more rational basis than
16 distinguishing between our peaceful citizens and our enemy combatants
17 who happened to be noncitizens. These two groups cannot be further
18 apart from one another on the spectrum of concern to the United
19 States government.

20 MJ [CAPT ALLRED]: Can I interrupt you for a moment?

21 CTC [MR. TRIVETT]: Yes, sir.

1 MJ [CAPT ALLRED]: Can you tell me why you think I should apply
2 a rational basis test rather than the strict scrutiny that the
3 defense said would normally apply when criminal rights are involved?

4 CTC [MR. TRIVETT]: Yes, sir. Because in no way, would an alien
5 unlawful enemy combatant be considered a suspect class that has
6 traditionally been discriminated against by the U.S. government which
7 requires protection, but that of alienage or race or gender. This
8 goes specifically to one declaring himself an alien--an enemy
9 combatant of the United States and the military judge after having
10 gone through an adversarial process determining that he is in fact an
11 enemy of the United States. This is not something where we should be
12 concerned at all on whether or not it is a suspect class. It is not
13 a suspect class; the only class that is, is the enemy class.

14 The defense brings up three issues specifically. They deal
15 with generally admissibility of evidence and how it can come in as
16 well as the Geneva Conventions and some cite to a failure in Military
17 Commission Act to afford the rights that the accused would have in a
18 federal trial. What the consideration should be, if you're looking
19 at similarly situated people is not what he would get in a federal
20 trial or even a court-martial but what he would get at other law of
21 war tribunals that are charged with holding those responsible for
22 violating laws of war. And the prosecution would note that the
23 International Criminal Tribunal of Yugoslavia, the International

1 Criminal Tribunal for Rwanda, the International Criminal Court, the
2 International Military Tribunal at Nuremberg, and the International
3 Military Tribunal in Tokyo, all had a similar or exact evidentiary
4 standard as Military Commissions Act has.

5 Furthermore, the Geneva Conventions have been determined by
6 the Supreme Court in *Eisentrager* which has not been disturbed at,
7 which is briefed in the United States' brief as not being something--
8 a right that can be self executed that an individual can bring up
9 that right as to way to try to enforce Geneva Conventions. Now, the
10 Conventions are a matter that needs to be enforced between the two
11 countries who have the treaty obligations with one another. So to
12 suggest that he would have the right to invoke the Geneva Conventions
13 as a source of right in federal court, to prosecution is saying,
14 misstates with the Geneva Conventions were given--can do.

15 Nothing further, sir.

16 MJ [CAPT ALLRED]: Before you sit down----

17 CTC [MR. TRIVETT]: Yes, sir?

18 MJ [CAPT ALLRED]: I don't remember seeing in your brief the
19 comparison between the Military Commissions Act and these other
20 international tribunals that you've just mentioned.

21 CTC [MR. TRIVETT]: Yes, sir.

22 MJ [CAPT ALLRED]: Is that in here?

1 CTC [MR. TRIVETT]: It is not in there. It was in a direct
2 response to something that the defense counsel argued. So I wanted
3 to address it in argument.

4 MJ [CAPT ALLRED]: Can you provide me some evidence to that
5 effect?

6 CTC [MR. TRIVETT]: Yes, sir. I would be happy to file a
7 supplemental brief on that issue. And I believe, sir, actually it is
8 in D003 which is the prosecution's motion for inadmissibility of *The*
9 *al Qaeda Plan* which we will be litigating later. So we have set
10 forth the evidentiary standard for those following tribunals.

11 MJ [CAPT ALLRED]: Okay, if it's in there, I can find it in
12 there.

13 CTC [MR. TRIVETT]: Yes, sir.

14 MJ [CAPT ALLRED]: Why don't you check that, though and if it's
15 not in there I like to see that--[**LCDR Stone gave a positive**
16 **response**] is it in there? Do you remember?

17 TC [LCDR STONE]: I do believe it is, sir.

18 MJ [CAPT ALLRED]: Well, I'll find it there then.

19 Do you want to respond to Mr. McMillan's argument that the
20 supreme Co--Military Commissions Act is a separation of powers
21 violation because it purports to reverse the Supreme Court
22 declaration to the extent--I think the argument was that the Supreme
23 Court found in this case, *Hamdan versus Rumsfeld* that the accused is

1 entitled to be protected by the Geneva Convention and the Military
2 Commissions Act states that he can't appeal to that as a source of
3 rights.

4 Would you make that argument again if you already addressed
5 it?

6 CTC [MR. TRIVETT]: Yes, sir.

7 Specifically in *Hamdan v. Rumsfeld*, the majority found
8 specifically that Congress had only authorized the President to--he
9 had authorized the President specifically to set up military
10 commissions under the law of war and it founded that the Geneva
11 Convention were one part of the law of war. Therefore because
12 congressional authorization under Article 21 was specific to that,
13 the President must have complied with Common Article 3.

14 Now, of course, the prosecution's position is that Common
15 Article 3 has been met fully in this instance in the Military
16 Commissions Act because specifically Congress said that it was. And
17 that Congress is primarily the unit of the government, I guess, to
18 decide whether or not treaty obligations were being met.

19 So in the Military Commissions Act that Article 21
20 provision of only having the law of war--only having authorization
21 for something where military commissions to be specific under the law
22 of war were surgically excised by the Congress in determining that

1 the Geneva Conventions are not an enforceable source of rights that
2 this military commissions.

3 MJ [CAPT ALLRED]: Okay, thank you.

4 CDC [MR. MCMILLAN]: Can I just offer two points in response,
5 Your Honor?

6 MJ [CAPT ALLRED]: Certainly.

7 CDC [MR. MCMILLAN]: Your Honor, first with respect to military
8 commissions specifically, this would be the very first military
9 commissions held in U.S. history in which the rights afforded to a
10 criminal defendant differ based on the nationality of the defendant.
11 It is telling that in the *Quirin* case U.S.--a U.S. citizen was a
12 criminal defendant alongside German nationals in that matter. There
13 was no discrimination whatsoever between those, defendants based on
14 citizenship.

15 What we see now under the regime established by the M.C.A.
16 is that unlawful enemy combatants, who are citizens, are tried in
17 U.S. courts such as John Walker Lindh such as Jose Padilla, while
18 alien unlawful enemy combatants such as Mr. Hamdan are tried in a
19 military commission with lesser criminal protections; and this is
20 unprecedented.

21 The other point--second point that I like to make is with
22 respect to the rights afforded to criminal defendants in
23 international tribunals such as the former Yugoslavia, Rwanda and any

1 others that may be set up by UN Security Council in compliance with
2 the Rome statutes or otherwise--none of them will discriminate among
3 criminal defendants based on nationality or citizenship. They can
4 point--the prosecution can point to no instance where different
5 levels of protection will be afforded to defendants in front of the
6 international criminal tribunal for the Yugoslavia, former Rwanda,
7 based on nationality; quite the contrary.

8 International law is very clear in expressly prohibiting
9 that kind of discrimination. The text of Common Article 3 and
10 Article--first paragraph of Article 75 of Additional Protocol 1, both
11 prohibit discrimination based on race, ethnicity, religion and other
12 similar criteria. Nationality is clearly other similar criteria.

13 So, those are the two points that I wanted to make. Thank
14 you, Your Honor.

15 MJ [CAPT ALLRED]: Thank you.

16 Well, let me ask this question to both sides then. Neither
17 side has touched upon it. But our military personnel, who are tried
18 under the UCMJ, get what is a considered to be a lesser type of
19 justice. Specifically, they're not entitled to a jury trial; they're
20 not entitled to a grand jury indictment. Has that been reviewed for
21 equal protection compliance?

22 CDC [MR. MCMILLAN]: Well, first, Your Honor, that is by express
23 constitutional provision in the Fifth Amendment that the land and

1 naval forces are excepted by the written text of that Amendment from
2 the full range of protections laid out in the Constitution. However,
3 under the UCMJ, there is a very robust set of procedural protections.
4 It may not include jury trial but a very robust set of procedural
5 protections that far exceed those being provided for criminal
6 defendants in front of the military commissions. So, for all
7 practical purposes, the protections afforded to U.S. military
8 personnel are fully commensurate with those provided to U.S.
9 citizens, if not in some cases, greater levels of protection.

10 MJ [CAPT ALLRED]: Do you think Congress' authority to define
11 and punish violations of law of nations which is an express
12 delegation, encompasses the right to create a system such as this and
13 get the deference it gets for--for the UCMJ?

14 CDC [MR. MCMILLAN]: No, Your Honor. The "define and punish
15 clause" is quite clear in its thrust and intent. It was to invest
16 with Congress, the power to provide greater definitional certainty to
17 universally recognized defenses under the laws of nations. It did
18 not--it does not encompass a right to set out differing procedures
19 for the prosecution of those offenses. It does not set out the right
20 to make international law, which if exercise as James Wilson said at
21 the Constitutional Convention in 1787, "would have a look of
22 arrogance about it. It would make us appear ridiculous." In
23 response to that comment, Governor Morris stated at the

1 Constitutional Convention that by defining, we do not mean make new
2 laws, we mean simply identify the parameters, the elements in a way,
3 which would be readily recognize by the community of nations.

4 Neither of the charges in this case are in that category
5 and indeed there is a plurality decision in the Supreme Court that
6 this Court has already recognized as binding effect under *res*
7 *judicata* doctrine with respect to conspiracy, that conspiracy is not
8 a common-law offense on the law of war----

9 MJ [CAPT ALLRED]: Well, okay. This is a different; this is a
10 different issue you're arguing. I understand that that's what
11 "define" means in the Constitution, what does "punish"--in other
12 words, the congressional--the specifically delegated power to punish
13 violations of the law of nations----

14 CDC [MR. MCMILLAN]: Let me just----

15 MJ [CAPT ALLRED]: ----may include, you know, some right to
16 create a system of court that's different from the federal courts.

17 CDC [MR. MCMILLAN]: Right. Article 1 courts can be set up,
18 there's no dispute that Congress can set up courts of this sort,
19 special tax courts, special bankruptcy courts, other types of courts
20 to punish offenses. However, it would be a mistake to assume that
21 that "define and punish" language would override the express
22 statement elsewhere in the Constitution that the equal protection of
23 the laws must be afforded to every person. So you would be weighing

1 a general phrase like Congress has the power to punish with a more
2 specific directive that in exercising that power to punish, the equal
3 protection of law must be afforded as the Supreme Court put it, "the
4 equal protection of the laws, is the protection of equal laws."

5 MJ [CAPT ALLRED]: Okay, thank you.

6 Government, anything final?

7 CTC [MR. TRIVETT]: Yes, sir. Can I take it from here **[at the**
8 **prosecution table]**, it's very brief?

9 MJ [CAPT ALLRED]: Certainly.

10 CTC [MR. TRIVETT]: Okay.

11 The prosecution's position and I'm glad that the Military
12 Judge asked it is that the "define and punish" means to, both, to
13 define and to punish. And the punish aspect, obviously can be
14 nothing other than setting up a system of procedures in order to
15 punish those who have violated the law of nations, which you have
16 just defined. So that's certainly the prosecution's position on it.

17 Defense counsel has said that Article 1 can set up courts
18 of this sort, tax courts, bankruptcy courts, as well commissions.
19 Then they somehow take the position that you can not read Article 1,
20 section 8 to override the equal protection clause within the Fifth
21 Amendment. Yet the obviously he has done that in the instance of the
22 land and naval forces because it's clear and we both agree, and I
23 think everyone agree that in regard to courts-martial process, it's

1 not full Fifth Amendment due process. There are certain things you
2 lose; a grand jury and other things that we not get into that were
3 all aware of.

4 But certainly there would be no exceptions. Once you
5 determine that the Article 1 section 8 clause included the ability to
6 punish which included the ability to set up a process, it would be on
7 no different footing then that of court-martials under the ability of
8 Congress to regulate the land and naval forces.

9 Thank you, sir.

10 MJ [CAPT ALLRED]: Okay. Well, I guess that completes our
11 arguments for today.

12 Were you about to take issue with me?

13 CDC [MR. SCHNEIDER]: No, sir. Not now, not ever. I do have
14 two points I would like to bring to your attention----

15 MJ [CAPT ALLRED]: Yes?

16 CDC [MR. SCHNEIDER]: ----if I may.

17 First, just an update on the status in regards to your
18 guidance this morning. I have the answers and written questions--
19 **[handing documents over to the prosecution]** court copies--of
20 questions in both English and Arabic and answers just in English;
21 consistent with your previous ruling that that was all the
22 governments seeks us to release.

1 MJ [CAPT ALLRED]: So they'll see the answers but not know what
2 the questions were?

3 CDC [MR. SCHNEIDER]: No, they've got the--I'm sorry. Questions
4 in English, answers in English. Questions also in Arabic, answers
5 were never provided to us in Arabic, consistent your previous e-mail
6 ruling.

7 Second, letters will go--will be received today by any
8 counsel who ever purported to represent one of these witnesses with
9 an update on what we expect and again inviting them to say so, if
10 they wish to be present for interview and testimony. And also
11 consistent with your ruling this morning, disclosing to attorneys for
12 Mr. Mohammed and Mr. bin Attash that their client's answers have been
13 provided today.

14 Third, we will make a written proposal today on procedures
15 we think would make sense including, with the risk of offending some
16 people in this courtroom, a proposal that when the witnesses testify,
17 the media be excused to observe and listen from the media center,
18 while the accused sits behind the glass with the time delay.

19 Last, it is my understanding that counsel for Mr. Al-
20 Sharqawi, John Chandler of Sutherland Asbill and Brennan in Atlanta,
21 habeas counsel, will be on the island this week. We expect to
22 arrange an interview and we will update the proffer, with whatever we

1 learn even if it is said that he refuses to testify, we'll let them
2 know.

3 Mr. bin Attash, again, is expecting to see LCDR Mizer with
4 any their cooperation from folks in D.C. that will occur and we will
5 update the proffer in the next day or two. Mr. Mohammed's counsel,
6 Lieutenant Commander, excuse me Lieutenant Colonel Acuff, I've
7 learned during the recess, is arriving tomorrow and is leaving
8 Thursday. We will endeavor to conduct that interview within the next
9 48 hours and update counsel. It will require a bit of cooperation
10 with Lieutenant Colonel Acuff and, we submit, cooperation with the
11 folks in D.C.

12 Last, I'm advised that recently detailed counsel for Abdul
13 Rehem Al Mishu will be on the island tomorrow leaving Thursday. Same
14 situation, we will conduct the interview in the next several days,
15 update the proffer, we will require the Government's cooperation with
16 the trial counsels who delivers, to get that done. I don't intend to
17 revisit issues. I just want to bring you up to date on the
18 developments.

19 Last issue, Lieutenant Commander Mizer has one
20 informational item that will affect the hearing on the coercion
21 motion later this week, which we would like to bring to your
22 attention.

23 MJ [CAPT ALLRED]: Very good.

1 DC [LCDR MIZER]: Thank you, Your Honor, I'll be equally brief.

2 On the 4th of April, you ordered the government to produce
3 all confinement records in relation to Mr. Hamdan. On June 24, we
4 were provided approximately 500 pages of confinement records, just
5 two days ago, on July 12, we were given, approximately another five
6 or 600 pages. It's a big stack of documents all jumbled out of
7 order, out of several different databases and we've been furiously
8 going through those documents during the past few days. What is
9 contained in those documents is an entry that on May 16, 2002, during
10 one of the key interrogation periods in this case, Mr. Hamdan was
11 stripped of his, of his comfort items and moved to a punishment
12 block. Several weeks later, on June 11, 2003, the period lasted 50
13 days until June 30, 2003, excuse me, July 30, 2003. So I want to be
14 clear, it's 11 June 2003 to July 30, 2003, Mr. Hamdan entered
15 something called Operation Sandman, which according to public source
16 documents, is a sleep deprivation program that was operating here and
17 I believe had been reflected in Time's Magazine account out the
18 interrogations of Al Katani.

19 I bring this to the court's attention because I'll be
20 turning in an affidavit later today to the court, filing an affidavit
21 with the court and also with the prosecution later today just so that
22 the court is not ambushed tomorrow, but the defense will be seeking
23 sanctions. We have not determined precisely what those will be.

1 First, we'll try to get to the stack of documents but just so that
2 the court is on notice and the prosecution is on notice as of today.

3 MJ [CAPT ALLRED]: Okay, thank you very much. Let's see for
4 tomorrow--oh, Mr. Trivett.

5 TC [LCDR STONE]: Sir, can I be heard very briefly?

6 MJ [CAPT ALLRED]: Certainly.

7 CTC [MR. TRIVETT]: Just for clarification purposes. It is the
8 prosecution's position that until we get the proffer which we now
9 have gotten, and we can look at the proffer and then determine
10 whether or not we want to object to the access, that access not yet
11 be granted to the defense counsel.

12 Mr. Schneider seems to indicate that they were getting
13 ready to go in and access the detainees. We just want to, for a
14 point of clarification, that we will have the opportunity to object
15 based on relevancy and materiality now that we have the proffer prior
16 to allowing that to occur.

17 MJ [CAPT ALLRED]: Well, you'll have to move quickly. I guess,
18 if their counsels are going to be here from Tuesday to Thursday. My
19 sense is that they could still potentially interview those witnesses
20 and you can later object to the introduction of any evidence on the
21 basis of materiality and relevance, but--why don't you look that over
22 this afternoon and see what your position is when we meet again in
23 the morning.

1 CTC [MR. TRIVETT]: Yes, sir.

2 MJ [CAPT ALLRED]: Okay?

3 CTC [MR. TRIVETT]: Thank you.

4 MJ [CAPT ALLRED]: Okay, as I remember our schedule. We're

5 scheduled tomorrow to hear the three motions that have to do with the

6 suppression of the accused's confessions, D-044, 047 and 029.

7 Is that what we're planning on? **[Counsels nodded in**

8 **acknowledgment.]** Okay. Fair enough----

9 DC [LCDR MIZER]: And Your Honor, I believe that you also

10 mentioned D-019, conditions of confinement.

11 MJ [CAPT ALLRED]: If we have time, we can go to the conditions

12 of confinement. I did write that down; you're right.

13 Let me ask you this, as long as we're standing here,

14 thinking about conditions of confinement. Are you going to ask me to

15 just give credit for confinement already served or to somehow change

16 the conditions of confinement?

17 DC [LCDR MIZER]: We will still be asking both, Your Honor. It

18 is going to be the evidence that we obtain tomorrow that will

19 demonstrate that it is interfering with Mr. Hamdan's ability to

20 participate in his defense even though he has satisfied the very low

21 threshold that he is competent to participate in these proceedings.

22 He understands that you are a judge that wears a robe, that we are

1 Defense lawyers. It's still interfering with our ability to assist
2 in his defense.

3 MJ [CAPT ALLRED]: Okay, the Government is on notice then, of
4 what the defense is asking for and they'll be prepared to respond
5 tomorrow.

6 CDC [MR. SWIFT]: Your Honor, I would note for the record, it
7 may be pr--I'm willing, I'm conducting the examinations of both
8 witnesses that we're calling, Dr. Keram and Mr. Hamdan and we'll be
9 calling them on both of the motions. At your description, I can do
10 that bifurcated, in other words talk----

11 MJ [CAPT ALLRED]: No, I think you can take all the testimony---
12 -

13 CDC [MR. SWIFT]: ----or I can take all the testimony on both of
14 them at the time and I think that's probably the fastest and best way
15 to do it.

16 MJ [CAPT ALLRED]: Good, we'll do that.

17 Okay, why don't we send stand in recess then until tomorrow
18 morning at nine o'clock?

19 **[The R.M.C. 803 session recessed at 1158, 14 July 2008.]**

20 **[END OF PAGE]**

1 [The R.M.C. 803 session was called to order at 0913, 15 July 2008.]

2 MJ [CAPT ALLRED]: The court is called to order. All parties
3 present when the court recessed except Mr. Trivett are present this
4 morning. Where's Mr. Trivett?

5 TC [LCDR STONE]: As we talked yesterday, Mr. Trivett is going
6 to be excused to deal with some issues with the court.

7 MJ [CAPT ALLRED]: I apologize for keeping you all waiting I
8 thought we were waiting for him to come down and join us and so,
9 obviously, we weren't.

10 TC [LCDR STONE]: Also, sir, Mr. McMillan from the defense has
11 departed the scene.

12 MJ [CAPT ALLRED]: Oh, what do you know about that, that's true?
13 Has he made his trip then?

14 CCDC [MR. SCHNEIDER]: We know he made it to the ferry
15 departure, Your Honor, after that he's on his own.

16 MJ [CAPT ALLRED]: Oh, he's catching----

17 CCDC [MR. SCHNEIDER]: After that he is on his own.

18 MJ [CAPT ALLRED]: Mr. Trivett--or Mr. McMillan is excused today
19 than?

20 CCDC [MR. SCHNEIDER]: Yes, please.

21 CDC [MR. SWIFT]: If it would please the court, Mr. Hamdan has
22 no objection to his excuse, for the record, Mr. McMillan has departed
23 to go assist in arguing Mr. Hamdan's motion in the federal court on

1 Thursday, so he is continuing in his representation and we're taking
2 advantage of having several counsel.

3 MJ [CAPT ALLRED]: Fair enough. Okay, this morning we have four
4 motions if I'm not mistaken. One addresses punitive conditions of
5 confinement asking for release from those conditions and credit for
6 pretrial confinement. And the other three in various ways ask some
7 of the accused statements be suppressed. Please in whatever order I
8 would--I'm sorry.

9 CDC [MR. SWIFT]: That's correct, Your Honor, I'd like to
10 propose the following order with the court's permission. First I
11 would like to have an administrative matter from Ms. Prasow, where
12 she indicates that she has been re-detailed; she'll do that
13 momentarily, just for the record.

14 Secondly, Mr. Schneider would like to speak briefly about
15 the affidavit that we filed with the court yesterday, because it
16 impacts both of our core revision in punitive conditions of
17 confinement motions particularly the coercion motions regarding
18 discovery that we have been provided here. We are going ahead with
19 the motions without full discovery but Mr. Schneider will get into
20 that.

21 And then finally just for the court's information. I don't
22 know if you have seen it yet but the prosecution and the defense were
23 actually able to agree on something, Your Honor. We came up with a

1 joint questionnaire, which we submitted to the court this morning
2 after consultation yesterday. That's been submitted for your
3 approval. We would ask that you take jointly, I believe, we ask that
4 you look at it this soonest because we need your approval before
5 sending it on to the members, but we have no objection from the
6 defense side to any of the questions. So as soon as it's approved,
7 my understanding is the prosecution will forward it.

8 MJ [CAPT ALLRED]: Well?

9 TC [LCDR STONE]: Yes, sir.

10 MJ [CAPT ALLRED]: Why don't I get to that as soon as we break
11 for lunch or something because I don't want to have you all wait
12 here?

13 CDC [MR. SWIFT]: That was not a suggestion, but just to alert
14 you that it is in.

15 MJ [CAPT ALLRED]: Okay.

16 CDC [MR. SWIFT]: And all will wait for its approval.

17 MJ [CAPT ALLRED]: And you want to get to that as soon as
18 possible?

19 CDC [MR. SWIFT]: Before we--on the record what I propose to do
20 later today is as I mentioned in court yesterday is call Mr. Hamdan
21 and then Dr. Keram. I was going to have them testify, they were
22 listed for both motions, so I will have them testify to both rather
23 than bifurcate.

1 MJ [CAPT ALLRED]: That's fine.

2 CDC [MR. SWIFT]: Then moving on after that whatever witnesses
3 the government may deem that it wants to call. I think the
4 government has represented to us that they may believe that there
5 isn't sufficient--there may be that they will argue that, Your Honor,
6 can rule without them calling witnesses, if Your Honor wants to hear
7 from the witnesses that I think they have a few of them. So we will
8 go forward from there.

9 MJ [CAPT ALLRED]: Take it away.

10 DC [MS. PRASOW]: Good morning, Your Honor.

11 MJ [CAPT ALLRED]: Good morning.

12 DC [MS. PRASOW]: I just want to note for the record I have been
13 re-detailed to this military commission by the Chief Defense Counsel
14 I'm qualified under R.M.C. 503 and I have been previously sworn in
15 accordance with R.M.C. 807. And I have not acted in any manner that
16 may tend to disqualify me in this proceeding and the document is
17 marked as the next appellate exhibit.

18 MJ [CAPT ALLRED]: Wonderful. Good to have you back on the
19 case; it's as if you were never gone.

20 DC [MR SCHNIEDER]: Well it didn't seem like that to us over the
21 last month, Your Honor, thank you. Just a word on the issue brought
22 to our attention through Lieutenant Commander Mizer's representation
23 yesterday and this affidavit that we forwarded yesterday.

1 MJ [CAPT ALLRED]: I did not receive that affidavit, whatever it
2 is it must have escaped my attention or----

3 CDC [MR SCHNIEDER]: We believe it was filed and we believe it
4 was sent to your attention.

5 MJ [CAPT ALLRED]: Okay.

6 CDC [MR SCHNIEDER]: You are well aware of the relief that we
7 seek on various motions here today. The testimony you will hear
8 pertains also to the request that we undoubtedly will make the time
9 when we argue the motions. I just want to alert you to that. Under
10 Rule 701 for Military Commission changed to discovering that as we
11 expect the evidence to show that the materials produced and Saturday
12 we received and reviewed by us Sunday night in reference the
13 OPERATION SANDMAN program is significant and we would suggest that
14 trial counsel surely put that in our hands as soon as they received
15 the issues what the party did in the way of adhering to its discovery
16 obligations.

17 The Mizer Affidavit when you do consider it outlines
18 production you would review and we consider to be significant. The
19 significance I believe the evidence will show stems from the fact
20 that when we requested discovery, we asked generally about
21 interrogation protocols and detention programs. We asked
22 specifically about the so-called biscuit behavioral science
23 consultations and it was our understanding and surely it was trial

1 counsel's understanding based on what we both knew such didn't occur
2 with regard to this accused. And if the evidence shows that it did
3 it will be a different day. In the summer of 2003, we believe we
4 will see how the evidence comes in and that some sort of appropriate
5 relief under Rule 701(1), which provides most of what the court is
6 aware of from other rules.

7 We would expect at that time to see some sort of relief.
8 We don't know what to expect the evidence will support, but I just
9 want to make sure that no one was surprised, if that is what we do at
10 the close of the evidence and at the beginning of the arguments.

11 TC [LCDR STONE]: Sir, we will address our wait to argue
12 probably best wait to argue.

13 MJ [CAPT ALLRED]: Well, they haven't asked for anything yet, so
14 I don't think we need to----

15 CDC [MR SCHNIEDER]: I was trying to carefully not argue so that
16 my friend on the other side of the aisle would not have to.

17 MJ [CAPT ALLRED]: Okay, why don't we go ahead and take whatever
18 evidence you would like to offer or who's leading the charge this
19 morning, is that you Mr. Swift?

20 CDC [MR SCHNIEDER]: Swift will be leading the charge.

21 CDC [MR. SWIFT]: I will, sir. To alert the court, Mr. Hamdan
22 is our first witness. For cultural reasons Mr. Hamdan does not want
23 to raise his hand. He is willing to be sworn in, but in cultural

1 references this will be incorrect for him and said that we asked
2 simply to stand and have the oath be administered to him.

3 MJ [CAPT ALLRED]: That's fine.

4 CDC [MR. SWIFT]: We call the defendant in this case, Mr. Salim
5 Hamdan.

6 MJ [CAPT ALLRED]: Very good.

7 CDC [MR. SWIFT]: For the record, Mr. Hamdan is being called for
8 the limited purposes of the coercion and the confinement motion.

9 MJ [CAPT ALLRED]: Very well. He'll probably need to take his
10 headset with him so he can hear the question when it is posed or the
11 translation I should say. Our technology master is here with a
12 better solution.

13 [TECHNOLOGY]: We need to swap headsets.

14 **[Technology gave Mr. Hamdan better headset while he approaches**
15 **witness stand.]**

16 CTC [MR. MURPHY]: Your Honor, even though Commander Stone is
17 going to examine the witness, I'll swear him.

18 MJ [CAPT ALLRED]: Very good. I think you are standing behind
19 the pole. Can you see him?

20 CTC [MR. MURPHY]: I can see him. I'll stand over further.

21 MJ [CAPT ALLRED]: I'm not sure he realizes who's speaking to
22 him just yet. Good morning, Mr. Hamdan.

23 ACC [MR HAMDAN]: Good morning.

1 DEF INT [MR. SCHMITZ]: He's not hearing anything.

2 MJ [CAPT ALLRED]: You're not hearing the translation in Arabic?
3 Apparently the witness is not hearing the Arabic translation in his
4 headset yet.

5 **[Technology personnel came in to fix headset.]**

6 MJ [CAPT ALLRED]: Step up there and do whatever you need to do
7 to make sure works, please.

8 **[Technology and court interpreter testing the headset.]**

9 **MR SALIM HAMDAN, Accused, was called as a witness for the defense,**
10 **was sworn, and testified as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by defense counsel:**

13 Q [MR. SWIFT]: Mr. Hamdan, I'm going to begin with some
14 background questions. Are you Salim Hamdan, the defendant in this
15 case?

16 A [MR. HAMDAN]: Yes.

17 Q [MR. SWIFT]: Were you brought to Guantanamo Bay in May of
18 2002?

19 A [MR. HAMDAN]: Yes.

20 Q [MR. SWIFT]: I would like you to describe the trip from in
21 Afghanistan to Guantanamo Bay if you could?

22 A [MR. HAMDAN]: They brought us by plane. They chained my
23 hands and chained my feet also around my waist. They pushed me

1 inside the plane and they tied me on the seat of the plane. I don't
2 know what kind of seat it was, but it wasn't the common plane seat.
3 I couldn't move while I was sitting there at all. They took a
4 blindfold over my eyes and they covered my ears with like headphones
5 but I couldn't hear anything. And they also put something over my
6 nose and mouth. It was a very, very tough journey and then we
7 arrived in Cuba. I do not know how to explain, but it was such a
8 trip.

9 MJ [CAPT ALLRED]: Will the interpreter speak a little more
10 loudly or the technology people turn up the volume of the English,
11 please.

12 CT INT: Yes, Your Honor.

13 A [MR. HAMDAN]: I don't know how many hours the trip took but
14 we were in the plane for a long time. I was just sitting not knowing
15 what was going on and then the torture started they came and took me
16 to the plane. We got on the plane right after sunset and I got off
17 the plane almost right after the sunset prayers. How much more can I
18 explain?

19 Q [MR. SWIFT]: Could you walk when you got off of the plane?

20 A [MR. HAMDAN]: I did not do anything all I know is that there
21 were just two people walking me.

22

23

1 Q [MR. SWIFT]: Do you suffer from back problems?

2 A [MR. HAMDAN]: Yes, I do have back pain.

3 Q [MR. SWIFT]: Were they aggravated by the flight?

4 A [MR. HAMDAN]: Such severe pain I cannot really explain.

5 Q [MR. SWIFT]: Were you given any medication before you began

6 the trip?

7 A [MR. HAMDAN]: No.

8 Q [MR. SWIFT]: Did you complain of your back problems while you

9 were on the plane?

10 A [MR. HAMDAN]: Inside the plane?

11 Q [MR. SWIFT]: Yes.

12 A [MR. HAMDAN]: No.

13 Q [MR. SWIFT]: When you got to Guantanamo can you describe

14 where you were taken?

15 A [MR. HAMDAN]: They placed us in Camp Delta.

16 Q [MR. SWIFT]: Can you describe the cell that you were placed

17 into?

18 A [MR. HAMDAN]: A small cell made out of steel very small about

19 2 m x 180 cm.

20 Q [MR. SWIFT]: Does that include the bed?

21 A [MR. HAMDAN]: Yes that includes the bed that was in there.

22

23

1 Q [MR. SWIFT]: What items were you given in the cell?

2 A [MR. HAMDAN]: There was a blanket, towel, sheet, some other
3 like a plastic cover; I don't know what to call it just like a
4 mattress.

5 Q [MR. SWIFT]: What kind of clothes were you given?

6 A [MR. HAMDAN]: Undershirt and the pants.

7 Q [MR. SWIFT]: Were you given a copy of the Koran?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: Were you giving any other clothes?

10 A [MR. HAMDAN]: No.

11 Q [MR. SWIFT]: Were you given a prayer rug?

12 A [MR. HAMDAN]: No.

13 Q [MR. SWIFT]: Were you given a toothbrush?

14 A [MR. HAMDAN]: Yes.

15 Q [MR. SWIFT]: Were you given soap?

16 A [MR. HAMDAN]: Yes.

17 Q [MR. SWIFT]: Were you given any other items I have not
18 mentioned?

19 A [MR. HAMDAN]: There was nothing else.

20 Q [MR. SWIFT]: Could you see be outdoors from your cell?

21 A [MR. HAMDAN]: I didn't understand the question.

22

23

1 Q [MR. SWIFT]: Did your cell have access to fresh air and
2 sunlight?

3 A [MR. HAMDAN]: Yes.

4 Q [MR. SWIFT]: Could you talk to other detainees?

5 A [MR. HAMDAN]: Yes.

6 Q [MR. SWIFT]: Did you have to shout to be able to talk to
7 these other detainees?

8 A [MR. HAMDAN]: No.

9 Q [MR. SWIFT]: Could you see other detainees?

10 A [MR. HAMDAN]: Yes.

11 Q [MR. SWIFT]: Were you allowed recreation?

12 A [MR. HAMDAN]: I didn't understand the question.

13 Q [MR. SWIFT]: Were you allowed to go to exercise?

14 A [MR. HAMDAN]: Yes.

15 Q [MR. SWIFT]: How often?

16 A [MR. HAMDAN]: Three times a week.

17 Q [MR. SWIFT]: For how long?

18 A [MR. HAMDAN]: For 15 minutes.

19 Q [MR. SWIFT]: How soon after you were brought to Guantanamo
20 did the questioning began?

21 A [MR. HAMDAN]: Can you repeat the question?

22

23

1 Q [MR. SWIFT]: How soon after you are brought to Guantanamo to
2 the questioning began?

3 A [MR. HAMDAN]: Immediately.

4 Q [MR. SWIFT]: When you were being questioned did your
5 conditions of confinement change?

6 A [MR. HAMDAN]: Yes.

7 Q [MR. SWIFT]: How did they change?

8 A [MR. HAMDAN]: Through the investigator.

9 MJ [CAPT ALLRED]: I'm sorry; I didn't hear the answer to the
10 question how soon after your arrival did the questioning began.
11 Either I missed it or I was looking for--I think I was looking for
12 Mr. Schneider he disappeared behind you and--what was the answer
13 again?

14 CDC [MR. SWIFT]: The answer was immediately.

15 MJ [CAPT ALLRED]: Immediately. Okay, thank you.

16 CDC [MR. SWIFT]: But I didn't understand the translated answer
17 to how the conditions changed.

18 MJ [CAPT ALLRED]: I didn't either, I'm sorry; he was still
19 thinking about that.

20 CDC [MR. SWIFT]: I'll repeat the question.

21 How did you conditions change?

22 A [MR. HAMDAN]: For example if I wanted to go from one room to
23 another room to be transferred, I asked the investigator do that for

1 me and he immediately transferred me.

2 MJ [CAPT ALLRED]: I didn't hear the last part of that.

3 A [MR. HAMDAN]: And they immediately transferred me.

4 MJ [CAPT ALLRED]: He did transfer?

5 A [MR. HAMDAN]: Yes they transferred rooms.

6 Q [MR. SWIFT]: So interrogators can make your conditions of
7 confinement better?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: Could they make them worse?

10 A [MR. HAMDAN]: Yes.

11 Q [MR. SWIFT]: Did they ever make it worse?

12 A [MR. HAMDAN]: Yes.

13 Q [MR. SWIFT]: How did they make it worse?

14 A [MR. HAMDAN]: Once they took all of my belongings from me and
15 I asked the one who was in charge of the cell what he take my stuff
16 away. I did not pose any problems and he said yes we do not have any
17 statement that says that you pose any problems, but they said that
18 the instruction or that order came from the investigator.

19 Q [MR. SWIFT]: What did they do with your belongings?

20 A [MR. HAMDAN]: I don't know they just took it away from me.

21 Q [MR. SWIFT]: Did they give them back at some point?

22 A [MR. HAMDAN]: Yes.

23

1 Q [MR. SWIFT]: When was that?

2 A [MR. HAMDAN]: Right after I met with the interrogator.

3 Q [MR. SWIFT]: Do you remember when they took away your

4 belongings, what time of year that was?

5 A [MR. HAMDAN]: I remember that incident was the first of the

6 year.

7 Q [MR. SWIFT]: Was it soon after you arrived in Guantanamo?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: Besides your belongings in the cell you were in

10 could the interrogators control other parts of your life?

11 A [MR. HAMDAN]: Yes.

12 Q [MR. SWIFT]: What else do they have control over?

13 A [MR. HAMDAN]: I didn't understand your question.

14 Q [MR. SWIFT]: Could interrogators help you with medical care?

15 A [MR. HAMDAN]: Yes.

16 Q [MR. SWIFT]: Can you tell me about that?

17 A [MR. HAMDAN]: Once I was inside the cell and I was sick for a

18 period of one week. I asked the nursing staff and I asked the

19 soldiers, but he did not provide me with anything. They didn't even

20 pay any attention to my request. Then I went to the investigator,

21 the interrogation. I spoke with the interrogator and he told me that

22 we will bring you the doctor now, 5 minutes in the doctor came to see

23 me.

1 Q [MR. SWIFT]: Did the interrogator know but your problems
2 before you told him?

3 A [MR. HAMDAN]: I don't know.

4 Q [MR. SWIFT]: Where was this interrogation taking place?

5 A [MR. HAMDAN]: Delta camp.

6 Q [MR. SWIFT]: Do you know how far medical was from where the
7 interrogation was?

8 A [MR. HAMDAN]: We were all mixed close to each other.

9 Q [MR. SWIFT]: You were close to each other?

10 A [MR. HAMDAN]: Yes close to each other.

11 Q [MR. SWIFT]: When you asked for a doctor on the block how
12 long does it take the doctor to get there?

13 A [MR. HAMDAN]: It depends on the doctor.

14 Q [MR. SWIFT]: Did one ever get there in five minutes?

15 A [MR. HAMDAN]: No.

16 Q [MR. SWIFT]: Where did the doctor treat you when you were
17 with the investigator?

18 A [MR. HAMDAN]: In the interrogator room.

19 Q [MR. SWIFT]: Was the interrogator present?

20 A [MR. HAMDAN]: Yes.

21 Q [MR. SWIFT]: What did the doctor treat you for?

22 A [MR. HAMDAN]: My back.

23

1 Q [MR. SWIFT]: Are you suffering from back pain now?

2 A [MR. HAMDAN]: Yes.

3 Q [MR. SWIFT]: Your back pain does that make it difficult to

4 sit?

5 A [MR. HAMDAN]: Yes.

6 Q [MR. SWIFT]: Did the interrogators continue to help with your

7 medical treatment?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: How did they help?

10 A [MR. HAMDAN]: When I felt sick I called the interrogator

11 directly.

12 Q [MR. SWIFT]: Why not call the doctor?

13 A [MR. HAMDAN]: I mentioned to you before, I sat there an

14 entire week and no one paid attention to me. But when I saw the

15 interrogator I get the attention immediately.

16 Q [MR. SWIFT]: Did the interrogators ever bring you medicine?

17 A [MR. HAMDAN]: No.

18 Q [MR. SWIFT]: Did they bring the Corpsman on other occasions?

19 A [MR. HAMDAN]: Yes.

20 Q [MR. SWIFT]: Did you ever go to medical and the interrogators

21 were waiting for you there?

22 A [MR. HAMDAN]: Yes.

23

1 Q [MR. SWIFT]: How many times did that happen?

2 A [MR. HAMDAN]: I do not remember.

3 Q [MR. SWIFT]: Was it more than three?

4 A [MR. HAMDAN]: Almost.

5 Q [MR. SWIFT]: About three or four times then?

6 A [MR. HAMDAN]: Not less than three times.

7 Q [MR. SWIFT]: Not less than three. Were you interrogated by

8 female interrogators?

9 A [MR. HAMDAN]: Yes, many times.

10 Q [MR. SWIFT]: Did it bother you to be interrogated by female

11 interrogators?

12 A [MR. HAMDAN]: Yes.

13 Q [MR. SWIFT]: Why?

14 A [MR. HAMDAN]: Can you please clarify the question?

15 Q [MR. SWIFT]: You testified that you do not like being

16 interrogated by female interrogators, do you remember that?

17 A [MR. HAMDAN]: Yes.

18 Q [MR. SWIFT]: What about being interrogated by females did you

19 not like?

20 A [MR. HAMDAN]: She behaved in a way, improper way.

21 Q [MR. SWIFT]: Did all female interrogators behave in an

22 improper way or just one?

23 A [MR. HAMDAN]: Not all of them.

1 Q [MR. SWIFT]: How many?

2 A [MR. HAMDAN]: I remember just one.

3 Q [MR. SWIFT]: When you say an improper way can you explain to
4 the judge what was improper?

5 A [MR. HAMDAN]: A woman behaved in an improper way with a man
6 without me doing anything. She asked me some questions and I
7 answered those questions. Right after that she behaved in that
8 manner with me. She was far from me and then she came closer to me.
9 And she came very close with her whole body towards me, I couldn't do
10 anything.

11 Q [MR. SWIFT]: Why couldn't you do anything?

12 A [MR. HAMDAN]: I was afraid of the soldiers.

13 Q [MR. SWIFT]: What happened then?

14 A [MR. HAMDAN]: She backed up right then.

15 Q [MR. SWIFT]: When she came close did she touch you?

16 A [MR. HAMDAN]: Yes.

17 Q [MR. SWIFT]: Where did she touch you?

18 A [MR. HAMDAN]: She touched me above the knee, above the knee
19 meaning, from above the knee all the way up here.

20 CDC [MR. SWIFT]: For the record Mr. Hamdan touched his knee and
21 then I believe reached up to the top of his waist and pointed to
22 there, which would be about along the thigh to the groin, but I'll
23 clarify it, it's a difficult area for him.

1 MJ [CAPT ALLRED]: I think that's what he maybe--you might
2 clarify exactly what he meant to indicate.

3 Q [MR. SWIFT]: Mr. Hamdan because this record and because it's
4 difficult for the judge to see you from where he's sitting. I know
5 it's difficult, but I'm going to need you to tell me somewhere above
6 the knee she touched.

7 A [MR. HAMDAN]: It's difficult for me to say that.

8 Q [MR. SWIFT]: I understand that.

9 MJ [CAPT ALLRED]: Do you want to lead him a little bit here?

10 Q [MR. SWIFT]: With your permission, Your Honor, Mr. Hamdan
11 you've indicated that she touched you above your knee, did she touch
12 your thigh?

13 A [MR. HAMDAN]: Yes.

14 Q [MR. SWIFT]: Did she touch your groin?

15 A [MR. HAMDAN]: She wanted to.

16 Q [MR. SWIFT]: Why do you say she wanted to?

17 A [MR. HAMDAN]: I said to her what do you want?

18 Q [MR. SWIFT]: What did she say?

19 A [MR. HAMDAN]: She said I want you to answer all of my
20 questions.

21 Q [MR. SWIFT]: I know this is difficult, but did she try to
22 touch your groin?

23 A [MR. HAMDAN]: I said to you before, yes.

1 Q [MR. SWIFT]: Was she successful in touching your groin?

2 A [MR. HAMDAN]: No.

3 Q [MR. SWIFT]: Why not?

4 A [MR. HAMDAN]: Because I asked her what do you want?

5 Q [MR. SWIFT]: Did you answer her questions after that?

6 A [MR. HAMDAN]: Yes.

7 Q [MR. SWIFT]: When did this happen, Mr. Hamdan?

8 A [MR. HAMDAN]: I do not remember.

9 Q [MR. SWIFT]: Was it soon after you came to Guantanamo?

10 A [MR. HAMDAN]: No.

11 Q [MR. SWIFT]: Was it after Ramadan of the first year that you

12 came to Guantanamo?

13 A [MR. HAMDAN]: Yes.

14 Q [MR. SWIFT]: Was it before the weather started turned hot

15 again the next year when you came to Guantanamo?

16 A [MR. HAMDAN]: Repeat please.

17 Q [MR. SWIFT]: In Guantanamo in the summertime it becomes much

18 hotter, had you observed that?

19 A [MR. HAMDAN]: No, I did not.

20 Q [MR. SWIFT]: Then my question won't deal--how long after

21 Ramadan of the first year it did this happen?

22 A [MR. HAMDAN]: I don't remember exactly but a few months.

23 CDC [MR. SWIFT]: A moment, Your Honor?

1 MJ [CAPT ALLRED]: Yes.

2 CDC [MR. SWIFT]: Your Honor, at a break we'll provide you
3 stipulation of when Ramadan was in 2002.

4 MJ [CAPT ALLRED]: Very good.

5 Q [MR. SWIFT]: Mr. Hamdan were you ever moved to punishment
6 blocks in the first year in Guantanamo?

7 A [MR. HAMDAN]: Yes.

8 Q [MR. SWIFT]: What were the reasons?

9 A [MR. HAMDAN]: The reason what?

10 Q [MR. SWIFT]: That you were moved to punishment blocks?

11 A [MR. HAMDAN]: Without a reason.

12 Q [MR. SWIFT]: I didn't understand the answer from the
13 translator.

14 A [MR. HAMDAN]: Without any reason. Without any reason.

15 Q [MR. SWIFT]: Sometimes when you were moved to punishment
16 blocks did the soldiers tell you it was for infractions, violations
17 of camp rules?

18 A [MR. HAMDAN]: Yes.

19 Q [MR. SWIFT]: Did they ever move you into a punishment block
20 when, without telling you that you had violated camp rules?

21 A [MR. HAMDAN]: Can you please repeat the question?

1 Q [MR. SWIFT]: Were you ever moved to a punishment block when--
2 let me rephrase. Were you ever moved to a punishment block without
3 being told that you had violated camp rules?

4 A [MR. HAMDAN]: I didn't understand the question, may I repeat
5 Your Honor. I did not understand what you were saying.

6 DEF INT [REDACTED]: He just said he didn't understand what
7 the translation was, not what he said.

8 MJ [CAPT ALLRED]: Interpreter you may repeat the question.

9 CT INT: Thank you, Your Honor.

10 A [MR. HAMDAN]: Yes. The answer to the question is yes.

11 Q [MR. SWIFT]: Do you remember December of last year a hearing
12 in this room?

13 A [MR. HAMDAN]: What?

14 Q [MR. SWIFT]: Do you remember a hearing last year in this room
15 before Judge Allred about whether you were a lawful combatant or not,
16 do you remember that hearing?

17 MJ [CAPT ALLRED]: I'm not sure he knows what Judge Allred
18 means, does he know my name?

19 DEF INT [REDACTED]: The translator didn't know.

20 MJ [CAPT ALLRED]: Okay.

21 CDC [MR. SWIFT]: Would the translator like me to repeat the
22 question?

1 Q [MR. SWIFT]: Do remember a hearing where witnesses were
2 called before Judge Allred?

3 A [MR. HAMDAN]: Yes.

4 Q [MR. SWIFT]: The government called two witnesses, FBI agents,
5 do remember that?

6 A [MR. HAMDAN]: Yes.

7 Q [MR. SWIFT]: The second FBI--the second agent, who's not
8 actually with the FBI who testified about talking with you, who spoke
9 Arabic, do you remember him?

10 A [MR. HAMDAN]: Yes.

11 Q [MR. SWIFT]: Do remember when he questioned you in
12 Guantanamo?

13 A [MR. HAMDAN]: Yes.

14 Q [MR. SWIFT]: When he questioned you were you in a punishment
15 block?

16 A [MR. HAMDAN]: Yes.

17 Q [MR. SWIFT]: What block was it?

18 A [MR. HAMDAN]: Tango block.

19 Q [MR. SWIFT]: Were you given a reason why you were moved to
20 Tango block?

21 A [MR. HAMDAN]: No.

22

1 Q [MR. SWIFT]: Were you told of any disciplinary infractions
2 that you had committed before you were moved to Tango block?

3 A [MR. HAMDAN]: No.

4 Q [MR. SWIFT]: Were you told how long you are going to be in
5 Tango block?

6 A [MR. HAMDAN]: No.

7 Q [MR. SWIFT]: How long were you in Tango Block before the
8 questioning began?

9 A [MR. HAMDAN]: I would say about 2 days.

10 Q [MR. SWIFT]: Were you able to sleep in Tango block?

11 A [MR. HAMDAN]: What do you mean by this question?

12 Q [MR. SWIFT]: Were you able to get a full night's sleep when
13 you were in Tango Block?

14 A [MR. HAMDAN]: Your question is unclear.

15 Q [MR. SWIFT]: Did the guards let you sleep in Tango block?

16 A [MR. HAMDAN]: That depends.

17 Q [MR. SWIFT]: Well tell me about what the guards did?

18 A [MR. HAMDAN]: If you were not to be interrogated, I remember
19 they won't let you get sleep.

20 Q [MR. SWIFT]: How would they do that?

21 A [MR. HAMDAN]: You tried to sleep the soldier comes and wakes
22 you up start slapping on your door. You wake up and you asked the
23 question, soldier what do you want, and says to you I am sorry. You

1 go back to sleep once again, the soldier comes back again within 5 to
2 10 minutes it's up to him, he can come back within an hour. All he
3 wants to do is to wake you up.

4 Q [MR. SWIFT]: How does he wake you up?

5 A [MR. HAMDAN]: I told you its either he knocks on the door or
6 causes some rackets or noise.

7 Q [MR. SWIFT]: While you were in Block Tango how often did this
8 happen?

9 A [MR. HAMDAN]: That happened to me during the time I was
10 interrogated.

11 Q [MR. SWIFT]: How many days when you interrogated?

12 A [MR. HAMDAN]: Less than a month.

13 Q [MR. SWIFT]: In that month how many times did you actually go
14 to interrogation?

15 A [MR. HAMDAN]: Almost 3 or 4 times.

16 Q [MR. SWIFT]: Did the people in the interrogation speak
17 Arabic?

18 A [MR. HAMDAN]: Yes, there were people that spoke Arabic.

19 Q [MR. SWIFT]: Did you tell them about your problems getting
20 sleep?

21 A [MR. HAMDAN]: Yes.

22

23

1 Q [MR. SWIFT]: What they say?

2 A [MR. HAMDAN]: They do not answer me or they said they would
3 look into it.

4 Q [MR SWIFT]: Did anything change?

5 A [MR HAMDAN]: No.

6 Q [MR SWIFT]: Did the guards wake you up every night during the
7 month that you were in interrogations?

8 A [MR HAMDAN]: Yes.

9 Q [MR SWIFT]: Could you sleep during the daytime?

10 A [MR HAMDAN]: Almost.

11 Q [MR SWIFT]: Can you clarify what you mean by almost?

12 A [MR HAMDAN]: I was able to take naps for about an hour to two
13 hours the most it would be was three hours.

14 Q [MR SWIFT]: Did you become very tired during this time?

15 A [MR HAMDAN]: Yes.

16 Q [MR SWIFT]: Do have a clear memory of all the interrogations
17 that occurred during this time?

18 A [MR HAMDAN]: No.

19 Q [MR SWIFT]: I want to move ahead to when you were moved to
20 Camp Echo, do you remember that?

21 A [MR HAMDAN]: When they transferred me to Echo Camp.

22 Q [MR SWIFT]: Yes?

23 A [MR HAMDAN]: Yes, I remember they transferred me there.

1 Q [MR SWIFT]: When was that?

2 A [MR HAMDAN]: I don't remember the exact date.

3 Q [MR SWIFT]: Was it in December of 2003?

4 A [MR HAMDAN]: Yes, that is correct it was in December 2003,

5 yes.

6 Q [MR. SWIFT]: Describe Camp Echo for me?

7 A [MR. HAMDAN]: Camp Echo is like a graveyard when you face a

8 dead person in a tomb that is Echo Camp.

9 Q [MR. SWIFT]: Can you describe it physically?

10 A [MR. HAMDAN]: It consists of a room and inside this room

11 there is another internal cell like the cell in Delta Camp. There is

12 an air conditioner that's it, that's how it is.

13 Q [MR. SWIFT]: Were you able to see any other detainees?

14 A [MR. HAMDAN]: No.

15 Q [MR. SWIFT]: Were you able to see the sunlight?

16 A [MR. HAMDAN]: No.

17 Q [MR. SWIFT]: Did you have any fresh air?

18 A [MR. HAMDAN]: No.

19 Q [MR. SWIFT]: Was a soldier inside the room with you?

20 A [MR. HAMDAN]: Yes.

21 Q [MR. SWIFT]: Would the soldier talk with you?

22 A [MR. HAMDAN]: I do not speak English.

23

1 Q [MR. SWIFT]: Were you allowed to exercise?

2 A [MR. HAMDAN]: Yes.

3 Q [MR. SWIFT]: Where did you exercise?

4 A [MR. HAMDAN]: At the beginning in Camp Echo it was not a
5 designated place to exercise.

6 Q [MR. SWIFT]: Did they build one?

7 A [MR. HAMDAN]: Yes, after a while.

8 Q [MR. SWIFT]: When, do you remember me coming to Camp Echo?

9 A [MR. HAMDAN]: Yes, I do.

10 Q [MR. SWIFT]: How long had you been in Camp Echo when I came
11 to see you?

12 A [MR. HAMDAN]: A little bit less than two months.

13 CDC [MR. SWIFT]: For the record your honor, I first visited Mr.
14 Hamdan on 30 January 2004, if the court will take that as a
15 stipulation in time.

16 TC [LCDR STONE]: Actually its--on their affidavit that they
17 attached to their motion. The date's already in the record.

18 MJ [CAPT ALLRED]: 30 January 2004, very good.

19 Q [MR. SWIFT]: Mr. Hamdan, how long were you in Camp Echo?

20 A [MR. HAMDAN]: Less than a year.

21 [END OF PAGE]

22

23

1 Q [MR. SWIFT]: Was it close to a year's time period, about how
2 long it months if you can?

3 A [MR. HAMDAN]: I do not remember how many months but I
4 remember that I left Camp Echo the first day of the month of Ramadan.

5 Q [MR. SWIFT]: In 2004, when you left Camp Echo where'd you go?

6 A [MR. HAMDAN]: I went to Baba Block.

7 Q [MR. SWIFT]: Actually before you went to Bravo Block,
8 correct?

9 A [MR. HAMDAN]: From where?

10 Q [MR. SWIFT]: From Camp Echo.

11 A [MR. HAMDAN]: No, from Camp Echo to Baba Block?

12 Q [MR. SWIFT]: I want to go back to Camp Echo for a moment, I
13 missed something. In Camp Echo did you talk to other detainees?

14 A [MR. HAMDAN]: No, of course not.

15 Q [MR. SWIFT]: Why not?

16 A [MR. HAMDAN]: Because it was prohibited I'm inside the room
17 and there is no one there to talk with. You are inside the room and
18 it's closed and you don't know if there are some others outside or
19 not.

20 Q [MR. SWIFT]: If you tried to shout so you could be heard
21 outside of the room was that a violation of the rules?

22 A [MR. HAMDAN]: Shout for who?

23

1 Q [MR. SWIFT]: To anyone that might hear you.

2 A [MR. HAMDAN]: I don't know if there is someone outside or
3 not.

4 Q [MR. SWIFT]: In his affidavit of Colonel Vargo in his
5 affidavit it says that in Camp Echo from 2003 to October of 2004 that
6 your conditions were the same as when they were in Camp Delta?

7 MJ [CAPT ALLRED]: Is Bravo Block part of Camp Echo?

8 CDC [MR. SWIFT]: Bravo Block is part of Camp Delta, sir.

9 MJ [CAPT ALLRED]: So ask your question again.

10 Q [MR. SWIFT]: In his affidavit Colonel Vargo indicates that the
11 conditions you enjoyed, Mr. Salim, in Camp Echo with the same as
12 detainees.

13 A [MR. HAMDAN]: I can't understand your question.

14 Q [MR. SWIFT]: I'll rephrase.

15 MJ [CAPT ALLRED]: I didn't either.

16 CDC [MR. SWIFT]: That's why I'm going to go back over it.

17 MJ [CAPT ALLRED]: That is in Bravo Block of Camp Delta you got
18 an affidavit that talks about Camp Echo so I missed the connection
19 too.

20 Q [MR. SWIFT]: I will rephrase Your Honor. Colonel Vargo
21 indicates in his affidavit that while you were in Camp Echo you have
22 the ability to speak with other detainees, is that true?

23 A [MR. HAMDAN]: No.

1 Q [MR. SWIFT]: That you had the ability to pray with other
2 detainees?

3 A [MR. HAMDAN]: No.

4 Q [MR. SWIFT]: That you had outdoor recreation with other
5 detainees.

6 A [MR. HAMDAN]: No, of course not.

7 Q [MR. SWIFT]: Now, in October of 2004 when you were
8 transferred to Bravo Block, can you describe what Bravo Block was?

9 A [MR. HAMDAN]: Are you saying Bravo translator? Excuse me I
10 didn't understand. I'm confused because he just said I came from
11 Echo Camp.

12 Q [MR. SWIFT]: When you left Echo Camp, where did you go?

13 A [MR. HAMDAN]: Baba Block.

14 Q [MR. SWIFT]: Can you describe Baba Block?

15 A [MR. HAMDAN]: We were six inside that block, six people.

16 Q [MR. SWIFT]: Who were they?

17 A [MR. HAMDAN]: It was me, Hicks, Abassi, al Bahlul, and al
18 Qosi and the soldiers.

19 Q [MR. SWIFT]: To clarify is it possible, Mr. Hamdan, that the
20 block was Papa block?

21 A [MR. HAMDAN]: Well look at this I do English you say papa,
22 the way I say papa. Don't confuse me.

1 Q [MR. SWIFT]: I'll try not to. How long were you in Papa
2 Block?

3 MJ [CAPT ALLRED]: So this is Papa Block now?

4 CDC [MR. SWIFT]: Yes.

5 MJ [CAPT ALLRED]: Inside Camp Delta? Everything that I heard
6 that I thought was bravo is now papa?

7 CDC [MR. SWIFT]: It is in fact, Your Honor, the problem on the
8 pronunciation is that----

9 MJ [CAPT ALLRED]: You and I speak English.

10 CDC [MR. SWIFT]: Yes, Your Honor.

11 MJ [CAPT ALLRED]: You were saying bravo.

12 CDC [MR. SWIFT]: Based on what the translator was saying.

13 MJ [CAPT ALLRED]: Okay.

14 CDC [MR. SWIFT]: There is no "P" in Arabic, so in trying to use
15 the English name we added confusion.

16 MJ [CAPT ALLRED]: Okay. Papa Block, Camp Delta.

17 Q [MR. SWIFT]: How long were you there?

18 A [MR. HAMDAN]: The entire month of Ramadan.

19 Q [MR. SWIFT]: Why were you moved?

20 A [MR. HAMDAN]: I don't know.

21 Q [MR. SWIFT]: When were you moved?

22 A [MR. HAMDAN]: After the month of Ramadan.

1 Q [MR. SWIFT]: Had anything happened in your court case before
2 you were moved?

3 A [MR. HAMDAN]: Yes.

4 Q [MR. SWIFT]: What had happened?

5 A [MR. HAMDAN]: The military trial, the commission stopped.

6 Q [MR. SWIFT]: Did the federal judge to your knowledge give an
7 order in conjunction with stopping your trial?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: And because of that order do you believe you
10 were moved out of Papa Block?

11 A [MR. HAMDAN]: Repeat please.

12 Q [MR. SWIFT]: Do you believe because of that order you were
13 moved out of Papa block?

14 DEF INT [REDACTED]: There was a mistranslation.

15 MJ [CAPT ALLRED]: You don't understand that question.

16 DEF INT [REDACTED]: No, there was a mistranslation.

17 MJ [CAPT ALLRED]: Interpreter apparently there is some
18 confusion, try it again.

19 Q [MR. SWIFT]: Do you believe that you were transferred out of
20 Papa Block because of the federal judge's order?

21 A [MR. HAMDAN]: Later on I knew about this.

22 Q [MR. SWIFT]: Tell me about where you were transferred to?

23 A [MR. HAMDAN]: To Echo block.

1 Q [MR. SWIFT]: Who was there?

2 A [MR. HAMDAN]: There was a lot of people in that block.

3 Q [MR. SWIFT]: Were you able to talk to them?

4 A [MR. HAMDAN]: No.

5 Q [MR. SWIFT]: Why not?

6 A [MR. HAMDAN]: Because the cells that were facing me and next
7 to me were empty and then the other people were in the inside.

8 Q [MR. SWIFT]: Who are the other people?

9 A [MR. HAMDAN]: There were Afghans and Arabs and other
10 nationalities present.

11 Q [MR. SWIFT]: Under Camp rules how many blocks--how many cells
12 away can you talk to someone?

13 DEF INT [REDACTED]: Mistranslation, try again.

14 Q [MR. SWIFT]: Under Camp rules how many cells away can you
15 talk to another detainee?

16 A [MR. HAMDAN]: I can speak within three cells.

17 Q [MR. SWIFT]: Was there anyone who spoke Arabic within three
18 cells of you?

19 A [MR. HAMDAN]: No.

20 Q [MR. SWIFT]: Could you speak to people when you exercised?

21 A [MR. HAMDAN]: No.

22 Q [MR. SWIFT]: Why not?

23 A [MR. HAMDAN]: I was alone.

1 Q [MR. SWIFT]: Every time you went to exercise?

2 MJ [CAPT ALLRED]: What was that last answer, I'm sorry.

3 CDC [MR. SWIFT]: He said I was alone.

4 MJ [CAPT ALLRED]: Okay.

5 Q [MR. SWIFT]: Was that every time you went to exercise?

6 A [MR. HAMDAN]: Yes.

7 Q [MR. SWIFT]: How long did this last?

8 A [MR. HAMDAN]: I didn't understand.

9 Q [MR. SWIFT]: How long did these conditions last?

10 A [MR. HAMDAN]: I do not understand the question, translator.

11 Q [MR. SWIFT]: How long did these conditions last?

12 A [MR. HAMDAN]: I can't remember.

13 Q [MR. SWIFT]: Was it more than a month?

14 A [MR. HAMDAN]: Yes.

15 Q [MR. SWIFT]: Was it more than six months?

16 A [MR. HAMDAN]: No, no.

17 Q [MR. SWIFT]: Was it around three months?

18 A [MR. HAMDAN]: I can't remember.

19 Q [MR. SWIFT]: Did the conditions eventually change?

20 A [MR. HAMDAN]: Yes.

21 Q [MR. SWIFT]: How did they change?

22 A [MR. HAMDAN]: They moved me to a different block.

23

1 Q [MR. SWIFT]: What was that block like?

2 A [MR. HAMDAN]: What do you mean?

3 Q [MR. SWIFT]: Were you able to talk to other detainees?

4 A [MR. HAMDAN]: Yes.

5 Q [MR. SWIFT]: Did you exercise with the detainees?

6 A [MR. HAMDAN]: No.

7 Q [MR. SWIFT]: Did you ever move to Camp Four?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: Do you remember when that happened?

10 MJ [CAPT ALLRED]: What's this called Camp Four?

11 CDC [MR. SWIFT]: Camp Four.

12 A [MR. HAMDAN]: It was before Ramadan within one month.

13 Q [MR. SWIFT]: Colonel Vargas indicates in his affidavit that

14 you were transferred in August of 2005, do you agree with that?

15 A [MR. HAMDAN]: Can you repeat the translation?

16 CDC [MR. SWIFT]: For point of record have we changed

17 translators?

18 CT INT: Yes.

19 MJ [CAPT ALLRED]: May I ask if his affidavit that you are

20 referring to is going to be provided to me?

21 CDC [MR. SWIFT]: It has been provided.

22 MJ [CAPT ALLRED]: Electronically?

23 CDC [MR. SWIFT]: Yes.

1 MJ [CAPT ALLRED]: I'm sorry; the computers weren't working this
2 morning. Do you have a copy of that, this is a government affidavit?

3 CDC [MR. SWIFT]: It is a government affidavit.

4 MJ [CAPT ALLRED]: Do you have a copy you can give me Commander
5 Stone because the computers were not working this morning.

6 TC [LCDR STONE]: I do.

7 MJ [CAPT ALLRED]: How much longer do you expect your
8 examination to take?

9 CDC [MR. SWIFT]: I would say about one more hour depending on
10 how translations go half an hour to an hour.

11 MJ [CAPT ALLRED]: Okay. Why don't we----

12 CDC [MR. SWIFT]: Given the difficulties that were having and
13 that we have been on for 90 minutes, I think it's in the court's
14 interest that if the first translator who Mr. Hamdan just understands
15 easier, if we take a break and he could finish up there that would
16 probably be to our benefit, because I'm repeating every question
17 three times at this point.

18 MJ [CAPT ALLRED]: Well, I was thinking about a recess just
19 because it's been 90 minutes. I don't want to interrupt your
20 examination if you----

21 CDC [MR. SWIFT]: I don't have--this is a good time for a
22 recess, sir.

1 MJ [CAPT ALLRED]: Okay. Why don't we take a recess then? I'll
2 review the affidavit and I'll know where we're at a little better and
3 everyone else can take a rest. Should we try to get back on the
4 record at eleven?

5 CDC [MR. SWIFT]: Yes, Your Honor.

6 MJ [CAPT ALLRED]: Court is in recess.

7 **[The R.M.C. 803 session recessed at 1043, 15 July 2008.]**

8 **[The R.M.C. 803 session was called to order at 1115, 15 July 2008.]**

9 MJ [CAPT ALLRED]: The court is called to order. Please
10 continue.

11 CDC [MR. SWIFT]: Thank you, Your Honor.

12 Q [MR. SWIFT]: To refresh your recollection Salim of where we
13 are at, we were talking about the period of time after you were
14 transferred from Papa block back into the rest of Camp Delta. And we
15 had talked about a period of time immediately thereafter your
16 conditions and how they had changed, if you were able to talk to
17 detainees. And I now want to move to a period of time when you were
18 transferred to Camp Four. Do remember being transferred to Camp
19 Four?

20 A [MR. HAMDAN]: Yes, I told you that was about a month before
21 Ramadan.

22

23

1 Q [MR. SWIFT]: Is Camp Four like the rest of the camps in
2 Guantanamo?

3 A [MR. HAMDAN]: No.

4 Q [MR. SWIFT]: What is Camp Four like?

5 DEF INT [REDACTED]: The translator is breathing into the
6 microphone.

7 Q [MR. SWIFT]: What is Camp Four like?

8 A [MR. HAMDAN]: Camp Four was a block that has four rooms.
9 Each room contains 10 people together. There was like a courtyard
10 outside the block. There was also space where they served food.
11 You'd be able to share a room with nine other people and live almost
12 a normal life. You sleep together and you pray together and you are
13 exposed to the sun and the fresh air. It's a very normal daily life.

14 Q [MR. SWIFT]: How did you feel when you were in Camp Four?

15 A [MR. HAMDAN]: I felt like I started to live again.

16 Q [MR. SWIFT]: Did you have to leave Camp Four?

17 A [MR. HAMDAN]: Yes, they took me back.

18 Q [MR. SWIFT]: Why?

19 A [MR. HAMDAN]: Because a problem took place.

20 Q [MR. SWIFT]: Can you describe the problem?

21 A [MR. HAMDAN]: That problem did not just happen to me by
22 myself that was about seven of us. We were outside the room, we were
23 in the courtyard and the soldiers were changing shifts the daytime

1 were changing the shift with the evening group. And one of the
2 soldiers came and asked us to move back inside the room. At that
3 time when he asked us to move back, it was our time to be on the
4 outside in the courtyard. And me and the other people that were with
5 it, the other seven people spoke with that soldier and we told him
6 that is our time to be outside, but he said to us no you must go
7 back. We said to him fine open the door now. The door was closed.
8 We asked him to open the door so we could go back inside; he said no,
9 I will not open the door of the room. So we said to him fine would
10 he want now, do you want us to go back into the room, then open the
11 door or you don't want us to go when, what exactly do you want?

12 Because there were two other soldiers, we spoke with the
13 other two soldiers and we asked them to explain and explain to that
14 soldier if he wants us to go back inside to open the door so we can
15 go in. Of course they want to talk to us, so me and the other seven
16 that were of us we got excited we got mad, we got angry and then we
17 spoke with him and I said to him what do you want us to do, are you
18 stupid? Even the others said even more stronger words to him. All I
19 said to him, why are you stupid? Just that and of course he didn't
20 open the door and left us alone.

21 In the following day he transferred me to Delta Camp, just
22 me and the rest of them they did not take any of them. Those who

1 spoke with the soldier with the stronger words, the words worse than
2 what I said to him, which was stupid. That's what happened.

3 Q [MR. SWIFT]: Mr. Hamdan is it important to follow the guards'
4 commands when you're in the prison?

5 A [MR. HAMDAN]: Repeat the translation please.

6 Q [MR. SWIFT]: I'll repeat the question. Is it important to
7 follow the guards' commands in the camp?

8 A [MR. HAMDAN]: Of course.

9 Q [MR. SWIFT]: Do you sometimes have trouble following the
10 guards' commands?

11 A [MR. HAMDAN]: One second, translator, please translate good,
12 repeat the last one, you repeat, not him.

13 MJ [CAPT ALLRED]: I think, Interpreter, he is talking to you,
14 he wants you to repeat the last question in Arabic.

15 CT INT: Yes, Your Honor.

16 A [MR. HAMDAN]: No, I don't have any problems.

17 Q [MR. SWIFT]: Have you gotten in trouble for not following the
18 guards' commands?

19 A [MR. HAMDAN]: I don't understand the question, how?

20 Q [MR. SWIFT]: Well have you been disciplined for failing to
21 follow commands?

22 A [MR. HAMDAN]: Yes.

23

1 Q [MR. SWIFT]: Do you sometimes get aggravated?

2 A [MR. HAMDAN]: Yes, just like any other person.

3 Q [MR. SWIFT]: Do you remember when we were in--when you were

4 in Camp Echo and we talked about following the guards' commands?

5 A [MR. HAMDAN]: You spoke to me about this?

6 Q [MR. SWIFT]: Yes.

7 A [MR. HAMDAN]: Yes, I remember you spoke to me about something

8 like this.

9 Q [MR. SWIFT]: Do you remember writing a sign that said don't

10 get angry?

11 A [MR. HAMDAN]: Yes.

12 Q [MR. SWIFT]: Why did you need a sign?

13 A [MR. HAMDAN]: So I don't get angry.

14 Q [MR. SWIFT]: Sometimes what you get angry without being able

15 to control it all?

16 A [MR. HAMDAN]: I don't know what you're.

17 Q [MR. SWIFT]: After you were transferred out of Camp Four did

18 they talk to you about your opportunities to go back to Camp Four,

19 did the guards talk to you?

20 A [MR. HAMDAN]: Yes.

21 Q [MR. SWIFT]: Did they say that you would be able to go to

22 back to Camp Four?

23 A [MR. HAMDAN]: They said it is possible.

1 Q [MR. SWIFT]: Later that fall did you participate in a hunger
2 strike?

3 A [MR. HAMDAN]: Yes.

4 Q [MR. SWIFT]: Why?

5 A [MR. HAMDAN]: Because I want to know why they took me away
6 from Camp Four.

7 Q [MR. SWIFT]: Would anyone tell you?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: What would they say?

10 A [MR. HAMDAN]: They said that I caused a problem in the fourth
11 Camp.

12 Q [MR. SWIFT]: How long did the hunger strike last?

13 A [MR. HAMDAN]: I think about a month.

14 Q [MR. SWIFT]: Why did you stop the hunger strike?

15 A [MR. HAMDAN]: I did not stop.

16 Q [MR. SWIFT]: Well did you start eating again at some point?

17 A [MR. HAMDAN]: Yes.

18 Q [MR. SWIFT]: Why did you start eating again at some point?

19 A [MR. HAMDAN]: Because they forced me to do so.

20 Q [MR. SWIFT]: Explain what happened when you said they forced
21 you to do so?

22 A [MR. HAMDAN]: When I was on strike they transferred me to a
23 hospital and install the pipe without my approval of course, and they

1 said that we are going to force you to do so, this is not against, we
2 know it's against your will.

3 Q [MR. SWIFT]: Did they use any Novocain; did they use any
4 medicine when they installed the pipe to help install it?

5 A [MR. HAMDAN]: Only the first time.

6 Q [MR. SWIFT]: How many times did they force feed you?

7 A [MR. HAMDAN]: Until I ate by myself on my own.

8 Q [MR. SWIFT]: On the second time was the pipe they put in your
9 nose larger than the first pipe?

10 A [MR. HAMDAN]: Yes.

11 Q [MR. SWIFT]: When they force-fed you the second time, were
12 you able to move about?

13 A [MR. HAMDAN]: During the feeding?

14 Q [MR. SWIFT]: Yes.

15 A [MR. HAMDAN]: No, of course not.

16 Q [MR. SWIFT]: How were you restrained?

17 A [MR. HAMDAN]: There was a special seat made so they can
18 force-feed you.

19 Q [MR. SWIFT]: Can you describe it?

20 MJ [CAPT ALLRED]: I don't think I need these details, I'm
21 satisfied that he was force-fed against his will. Is there some
22 reason why I need to hear the description of the process?

1 CDC [MR. SWIFT]: It will go--one of the issues that will come
2 up, Your Honor, is Mr. Hamdan repeatedly refusing, in his medical
3 records, medical care. It goes to one of the reasons as to why he
4 did that, I can probably bring it out better with Dr. Keram, and I am
5 willing to do that, it will probably be quicker.

6 MJ [CAPT ALLRED]: Let's do that.

7 CDC [MR. SWIFT]: But I wanted to have that on the record. We
8 will move on.

9 Q [MR. SWIFT]: Mr. Hamdan do you remember when the oral
10 argument in your case, in the Supreme Court occurred?

11 A [MR. HAMDAN]: Repeat please I didn't understand.

12 Q [MR. SWIFT]: Do you remember when Neal Catyal, one of your
13 attorneys made his argument before the Supreme Court in 2006, do you
14 remember that?

15 A [MR. HAMDAN]: Yes, he is one of my lawyers.

16 Q [MR. SWIFT]: What happened right after his argument?

17 A [MR. HAMDAN]: What do you mean what happened?

18 Q [MR. SWIFT]: Were you moved to a different camp right after
19 his argument?

20 A [MR. HAMDAN]: I don't remember which camp I was in.

21 Q [MR. SWIFT]: Were you ever moved to Camp Five.

22 A [MR. HAMDAN]: Yes.

23

1 Q [MR. SWIFT]: Do you remember when you were moved there?

2 A [MR. HAMDAN]: 2006.

3 Q [MR. SWIFT]: Who were you moved with?

4 A [MR. HAMDAN]: With the soldiers.

5 Q [MR. SWIFT]: Were there any detainees with you when you were

6 moved to Camp Five?

7 A [MR. HAMDAN]: Yes, yes.

8 Q [MR. SWIFT]: Who.

9 A [MR. HAMDAN]: The Vietnamese that were before the Military

10 Commission.

11 Q [MR. SWIFT]: Did you protest being moved to Camp Five?

12 A [MR. HAMDAN]: Of course.

13 Q [MR. SWIFT]: Why did you protest?

14 A [MR. HAMDAN]: Because I had an order from the civil--American

15 Civil Court that I should not be in solitary confinement.

16 Q [MR. SWIFT]: Was Camp Five solitary confinement?

17 A [MR. HAMDAN]: Of course.

18 Q [MR. SWIFT]: Describe Camp Five?

19 A [MR. HAMDAN]: Camp Five is several blocks. I was in Charlie

20 Block. Downstairs there was about 10 or 12 rooms of course it is

21 more room. Its size was about 2 1/2 meter by 190cm and there was a

22 bed, a bathroom--it wasn't even, its sides were not even.

23

1 Q [MR. SWIFT]: Could you talk to other detainees?

2 A [MR. HAMDAN]: Through shouting.

3 Q [MR. SWIFT]: Could you see the other detainees?

4 A [MR. HAMDAN]: No.

5 Q [MR. SWIFT]: Could you get in trouble for shouting?

6 A [MR. HAMDAN]: I do not remember.

7 Q [MR. SWIFT]: How long were you in Camp Five?

8 A [MR. HAMDAN]: Almost a month.

9 Q [MR. SWIFT]: Where you moved to?

10 A [MR. HAMDAN]: To the first camp, Delta Camp.

11 Q [MR. SWIFT]: Were the conditions in Delta Camp like the

12 conditions you first described when you came to Guantanamo?

13 A [MR. HAMDAN]: No, it was the same camp, same thing, nothing

14 changed.

15 Q [MR. SWIFT]: Are you still in Delta Camp?

16 A [MR. HAMDAN]: No.

17 Q [MR. SWIFT]: Were you ever transferred to Camp Six?

18 A [MR. HAMDAN]: Yes.

19 Q [MR. SWIFT]: When were you transferred to Camp Six?

20 A [MR. HAMDAN]: In December of 2006.

21 Q [MR. SWIFT]: What is Camp Six like?

22 A [MR. HAMDAN]: Camp Six is also to be considered a solitary

23 confinement camp, same thing a small room, same thing, it consists of

1 a bed, bathroom, but additionally it has glass, you can only see the
2 soldiers, of course I was never able to see the sun and you don't get
3 fresh air. The air conditioner is running 24 hours. The light is
4 very bright inside the room.

5 Q [MR. SWIFT]: Do they turn off the lights so you can sleep?

6 A [MR. HAMDAN]: They turn the lights off at 10 o'clock at night
7 and they turn them back on at 5 o'clock in the morning and one just
8 one night light remains lit. You would be able to read with that
9 light.

10 Q [MR. SWIFT]: Where are you now?

11 A [MR. HAMDAN]: Yes, now, I am here in the court room.

12 Q [MR. SWIFT]: Where are you being held right now, where are
13 living?

14 A [MR. HAMDAN]: The fifth camp.

15 Q [MR. SWIFT]: Have the conditions changed from the description
16 that you gave that it was like in 2006?

17 A [MR. HAMDAN]: No, only the people that are with me now are
18 regular Vietnamese.

19 Q [MR. SWIFT]: We've been working together for a long time
20 haven't we, you and I?

21 A [MR. HAMDAN]: I didn't understand.

22

23

1 Q [MR. SWIFT]: You and I--I've been your attorney for a long
2 time haven't I?

3 A [MR. HAMDAN]: Yes.

4 Q [MR. SWIFT]: And we've talked many times about where we
5 explain the proceedings and talk about what was going on, do remember
6 all those?

7 A [MR. HAMDAN]: Yes, I remember, I remember things.

8 Q [MR. SWIFT]: After you were moved into Camp Six and then Camp
9 Five did make it difficult to talk with me or with other attorneys?

10 A [MR. HAMDAN]: Yes.

11 Q [MR. SWIFT]: Why?

12 A [MR. HAMDAN]: Why did they place me in the fifth camp? I
13 always asked other lawyers and I ask you, my other lawyers and
14 lawyers that belong to me. Why am I being placed in the fifth camp
15 if you cannot do anything for me I do not need you, why are you my
16 lawyer, why do you defend me?

17 [END OF PAGE]

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1 Q [MR. SWIFT]: Your Honor if I might approach because I
2 understand you didn't get the electronic evidence today. And the
3 next thing that we are going to go over is Mr. Hamdan's parts of his
4 706 board. I previously furnished a copy of part two to the
5 government because certain parts of it became an issue with regards
6 to the discussion and certainly when Dr. Keram testifies to
7 facilitate you following along----

8 MJ [CAPT ALLRED]: You want to give me a copy of that----

9 Q [MR. SWIFT]: I'd like to provide you a copy.

10 MJ [CAPT ALLRED]: ----please? Why don't you let the bailiff
11 come get it from you, that will save you a little trouble?

12 CDC [MR. SWIFT]: From the court reporter to----

13 MJ [CAPT ALLRED]: Is this being admitted into evidence then?

14 CDC [MR. SWIFT]: I believe we furnished it as an appellate
15 exhibit this morning, have you received it court reporter? Part two
16 of the 706 board. I will do that----

17 MJ [CAPT ALLRED]: I'll give her this copy or you can get a copy
18 to her later this will be marked as the----

19 CDC [MR. SWIFT]: I would ask that it would be marked as the
20 next appellate exhibit in order.

21 MJ [CAPT ALLRED]: Very well.

22 CDC [MR. SWIFT]: Copy of which has previously been furnished to
23 the government.

1 Q [MR. SWIFT]: Mr. Hamdan earlier this month do remember
2 talking to an Army officer who is a doctor?

3 A [MR. HAMDAN]: Yes.

4 Q [MR. SWIFT]: How long did you talk with the doctor?

5 A [MR. HAMDAN]: I don't remember exactly, I don't know how
6 long.

7 Q [MR. SWIFT]: Was it more than an hour?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: Half a day?

10 A [MR. HAMDAN]: Less than half a day.

11 Q [MR. SWIFT]: In her affidavit for the court on page 6, on
12 Camp Four she indicates that you were moved out of camp Four in May
13 of 06 following a riot in Camp Four. Were you in camp Four in May of
14 06?

15 A [MR. HAMDAN]: No.

16 Q [MR. SWIFT]: When were you in Camp Four again?

17 A [MR. HAMDAN]: 2005.

18 [END OF PAGE]

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1 Q [MR. SWIFT]: I want to go over some questions and ask you
2 whether she asked them to you, for the record these come from the
3 DSM-IV. Did she ask you whether you had ever experienced or
4 witnessed or had been confronted with an event that involved death of
5 serious injury?

6 A [MR. HAMDAN]: I did not understand the question. I do not
7 understand what you are saying translator. Can you repeat what you
8 said once again?

9 MJ [CAPT ALLRED]: Why don't you simplify that----

10 CDC [MR. SWIFT]: I will.

11 MJ [CAPT ALLRED]: ----question and ask it again.

12 Q [MR. SWIFT]: Did she ask you had ever witnessed an event that
13 involved actual death or threat of death?

14 A [MR. HAMDAN]: Did the doctor ask me that question?

15 Q [MR. SWIFT]: Yes.

16 A [MR. HAMDAN]: No.

17 Q [MR. SWIFT]: Did she ask you if you had recurrent and
18 intrusive disturbing recollections of thoughts?

19 DEF INT [REDACTED]: That is a mistranslation.

20 [END OF PAGE]

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23

1 Q [MR. SWIFT]: I will ask the question again. I'll try and
2 simplify it. I will do it my best. It's important Your Honor.

3 MJ [CAPT ALLRED]: Well when you have this kind of complex
4 material that you know you're going to use, giving it in advance to
5 the interpreter will help them be prepared----

6 CDC [MR. SWIFT]: Yes, Your Honor.

7 MJ [CAPT ALLRED]: Do we have a lot of this material to cover?

8 CDC [MR. SWIFT]: I will cover some of the questions, no, Your
9 Honor, I'll use Dr. Keram.

10 MJ [CAPT ALLRED]: And those are big words and those are complex
11 even for English speakers to understand what that stuff means.

12 CDC [MR. SWIFT]: Yes, Your Honor.

13 MJ [CAPT ALLRED]: Well, let me just say this. Interpreters, if
14 you know you're going to working with quoting from text or something
15 that you want interpreters to handle correctly not only today, but
16 through the rest of the trial, give them the courtesy of a copy in
17 advance and highlight the material you intend to read or quote from,
18 so they can think about the words they'll need to use. You know. Do
19 a little advance planning. Okay. And I didn't mean to interrupt
20 your examination, but it looked like we were struggling there.

21 [END OF PAGE]

22

23

1 Q [MR. SWIFT]: I want to go at this point to the time before
2 you came to Guantanamo, Mr. Hamdan. Can you describe what you
3 witnessed at the time that you were captured at Takteh-Pol?

4 A [MR. HAMDAN]: The day I was captured?

5 Q [MR. SWIFT]: Yes.

6 A [MR. HAMDAN]: I was driving the car by myself and there were
7 people in front of me waving asking me to stop, stop. I had to stop
8 because all of them had weapons pointed at me, so I stopped. And
9 they asked me to step out of the vehicle. I did. And I stood next
10 to a different car of course in the same road. And when I stepped
11 out of the car no one talked to me and I didn't know who those people
12 were around me.

13 And of course there was a large number of people and I
14 started looking at them. Then I looked closely at them and I
15 discovered that they are not from the Taliban group. And so I try to
16 stay away and I try to find an exit so I could escape. So I was
17 behind the car, so I was behind the car and I heard them saying an
18 Arab, an Arab. I thought they were talking about me. So I looked
19 behind me and so I found that people from the camp arresting a
20 different person. So I looked at that person that was between them
21 and I kind of knew that he was an Arab. So about four or five
22 persons captured him.

1 So I walked a little bit farther and I looked behind me to
2 see if anyone was following me and not at the same time I looked at
3 the person that they captured. So I found that he was crawling with
4 them, so I try to go a little bit even further, once again I looked
5 behind me to see if anyone was behind me or not. And once again I
6 looked at them one more time. The second time when I looked I saw
7 that they threw him on the ground and all those people that were
8 around him shot him with their gunfire. But many of the people that
9 were present around tried to hide and go far away from the bullets so
10 it don't hit them. At this moment I tried to escape. And then I
11 found a hole in the ground and I went in there.

12 Q [MR. SWIFT]: What happened next?

13 A [MR. HAMDAN]: At that time it was night already, I thought
14 when it becomes real dark I will try to get out of this place.
15 Suddenly I heard the gun fires and explosives an explosion of bombs.
16 After a while the Afghan people came looking for something. I don't
17 know if they were looking for me or just something else and they
18 found me and they took me away.

19 Q [MR. SWIFT]: How did they treat you?

20 A [MR. HAMDAN]: A person captures his enemy what do you think
21 he will do to him?

22

23

1 Q [MR. SWIFT]: Well, I don't want to think I need you to tell
2 me what they did?

3 A [MR. HAMDAN]: They took me away and they were beating me. At
4 that time they wanted to kill me immediately. They were beating me
5 very hard, very severely, and they were pushing me hard and they were
6 beating me with their weapons and with their hands. After that a
7 voice came from in front saying do not kill him, do not kill him.
8 And one came to me and he dragged me and pulled me away from them.
9 And he was yelling to the others do not beat him up, leave him alone,
10 leave him alone.

11 Q [MR. SWIFT]: Was this in Arabic or in English or in Afghan
12 these voices?

13 A [MR. HAMDAN]: It was spoken in the Afghan language.

14 Q [MR. SWIFT]: How were you able to understand him?

15 A [MR. HAMDAN]: I speak a little bit of the Afghan language.

16 Q [MR. SWIFT]: Before you heard that voice were you afraid that
17 you were about to be killed?

18 A [MR. HAMDAN]: Yes, I was expecting, he was going to shoot at
19 me, kill me. And they just killed one a little while ago, you don't
20 think that he was going to kill me to?

21 Q [MR. SWIFT]: Did you know that there were Americans at the
22 place that you were captured, when you were captured?

23 A [MR. HAMDAN]: No.

1 Q [MR. SWIFT]: After you were captured how long were you held
2 in Takteh-Pol?

3 A [MR. HAMDAN]: I spent about seven days.

4 Q [MR. SWIFT]: Did Afghans talk to you?

5 A [MR. HAMDAN]: At the beginning I did not speak with anyone.

6 Q [MR. SWIFT]: After a while did you ever speak with the
7 Afghans?

8 A [MR. HAMDAN]: Yes.

9 Q [MR. SWIFT]: What did the Afghans say?

10 A [MR. HAMDAN]: I don't know what they said. They spoke with
11 me a few times.

12 Q [MR. SWIFT]: Did you talk to any Americans?

13 A [MR. HAMDAN]: When?

14 Q [MR. SWIFT]: When you were in Takteh-Pol?

15 A [MR. HAMDAN]: Yes.

16 Q [MR. SWIFT]: When you talked to the Americans were you still
17 afraid that you would be killed?

18 A [MR. HAMDAN]: When I spoke with the Americans?

19 Q [MR. SWIFT]: Yes.

20 A [MR. HAMDAN]: Yes.

21 Q [MR. SWIFT]: Why?

22 A [MR. HAMDAN]: Because the soldier was standing on top of my
23 head with a weapon.

1 Q [MR. SWIFT]: How many times did the Americans question you in
2 Takteh-Pol, do you remember?

3 A [MR. HAMDAN]: I remember only one time.

4 Q [MR. SWIFT]: What happened after you were in Takteh-Pol?

5 A [MR. HAMDAN]: I stayed with the Afghan people.

6 Q [MR. SWIFT]: Did you stay in Takteh-Pol?

7 A [MR. HAMDAN]: Seven days.

8 Q [MR. SWIFT]: After those seven days where did you go?

9 A [MR. HAMDAN]: They took us by airplane to Panjshir.

10 Q [MR. SWIFT]: Is that in Afghanistan?

11 A [MR. HAMDAN]: Yes.

12 Q [MR. SWIFT]: Where in Afghanistan?

13 A [MR. HAMDAN]: What is--where in Afghanistan?

14 Q [MR. SWIFT]: I'll clarify--to the Panjshir Valley in
15 Afghanistan?

16 A [MR. HAMDAN]: Yes, it is.

17 Q [MR. SWIFT]: How did you know it was the Panjshir Valley?

18 A [MR. HAMDAN]: After a while the time that I spent in Panjshir
19 I found out.

20 Q [MR. SWIFT]: Now, we have no records or witnesses regarding
21 your questioning in Panjshir so you're the only source. Were you
22 questioned in Panjshir?

23 A [MR. HAMDAN]: Yes.

1 Q [MR. SWIFT]: What happened during the questioning?

2 A [MR. HAMDAN]: Of course they questioned me in any manner, in
3 a manner of torturing.

4 Q [MR. SWIFT]: Can you tell me how?

5 A [MR. HAMDAN]: My hands were tied behind my back, I don't know
6 why they were tied and my feet also were tied and there was a bag
7 over my head. They made me sit on the ground. They grabbed my hands
8 from the back and pushed it up forward to make me fall on my face. I
9 am screaming and shouting.

10 Q [MR. SWIFT]: How many times did you fall on your face?

11 A [MR. HAMDAN]: I do not remember.

12 Q [MR. SWIFT]: Was it just once or twice?

13 A [MR. HAMDAN]: He was supposed to always keep my face down.

14 Q [MR. SWIFT]: Other than pressing your face against the ground
15 did they do anything when they were talking to you?

16 A [MR. HAMDAN]: He used to put his foot over my shoulder and
17 pushed down against me.

18 Q [MR. SWIFT]: Did this cause pain?

19 A [MR. HAMDAN]: Of course.

20 Q [MR. SWIFT]: Who--you said "he." Was this person American or
21 Afghan?

22 A [MR. HAMDAN]: These were Americans, but they were not Afghan
23 because they were wearing the American military uniform. And when he

1 took it off my face, took my pictures and put the hood back.

2 Q [MR. SWIFT]: While you were being questioned in the Panjshir
3 Valley were you afraid that you were going to be killed?

4 A [MR. HAMDAN]: Yes.

5 Q [MR. SWIFT]: Why?

6 A [MR. HAMDAN]: Because I am in Panjshir Valley.

7 Q [MR. SWIFT]: Why would the Panjshir Valley mean that's likely
8 that you would killed?

9 A [MR. HAMDAN]: Why am I in Panjshir Valley, why did they bring
10 me to Panjshir Valley?

11 Q [MR. SWIFT]: Was it a prison?

12 A [MR. HAMDAN]: I don't know.

13 Q [MR. SWIFT]: When did you arrive in Kandahar?

14 A [MR. HAMDAN]: A while after the month of Ramadan.

15 Q [MR. SWIFT]: What was it like in Kandahar?

16 A [MR. HAMDAN]: Give me one second; will you please repeat the
17 question about Kandahar?

18 Q [MR. SWIFT]: What was it like at Kandahar?

19 A [MR. HAMDAN]: That wasn't the question he asked me, when I
20 went to Kandahar, is that correct? Is that your question? I didn't
21 understand I think there was a mistake.

22

23

1 Q [MR. SWIFT]: There is. After the Panjshir Valley where did
2 you go to next?

3 A [MR. HAMDAN]: Bagram.

4 Q [MR. SWIFT]: When did you arrive in Bagram?

5 A [MR. HAMDAN]: That was the confusion. That was after
6 Ramadan.

7 Q [MR. SWIFT]: Tell me about Bagram? What were the conditions
8 like a Bagram?

9 A [MR. HAMDAN]: Very bad of course.

10 Q [MR. SWIFT]: Describe them?

11 A [MR. HAMDAN]: The handcuffs were on my hands and my feet
12 almost 24 hours. The location was very cold and of course I was
13 always by myself many, many questioning.

14 Q [MR. SWIFT]: While you were in Bagram were you mistreated?

15 A [MR. HAMDAN]: Sometimes, yes, I was.

16 Q [MR. SWIFT]: How?

17 A [MR. HAMDAN]: For example in a manner of interrogating.

18 Q [MR. SWIFT]: What would they do?

19 A [MR. HAMDAN]: The interrogator would come tell me to sit and
20 I would sit in front of him of course my hands were tied. One or two
21 soldiers were behind me their arms and also soldiers in front of me.
22 If I speak good with the interrogators the soldiers don't do
23 anything. If what I say was not liked by the interrogator the

1 soldiers put his knee in my back they would hit me lightly and strike
2 me lightly and he would say speak.

3 Q [MR. SWIFT]: Did you see any other--or did anything else
4 happen to you?

5 A [MR. HAMDAN]: I didn't understand your question.

6 Q [MR. SWIFT]: Beyond the soldiers putting their knee in your
7 back and striking you did anything else happen?

8 A [MR. HAMDAN]: I don't remember.

9 Q [MR. SWIFT]: Did you receive the worst treatment in Bagram?

10 A [MR. HAMDAN]: I don't remember.

11 Q [MR. SWIFT]: Did you see any other detainees mistreated?

12 A [MR. HAMDAN]: Yes.

13 Q [MR. SWIFT]: What happened----

14 DEF INT [REDACTED]: There was a mistranslation.

15 A [MR. HAMDAN]: Repeat. Where?

16 Q [MR. SWIFT]: At Bagram.

17 A [MR. HAMDAN]: I did not see.

18 Q [MR. SWIFT]: After Bagram where did you go?

19 A [MR. HAMDAN]: Kandahar.

20 Q [MR. SWIFT]: Was Kandahar better than Bagram?

21 A [MR. HAMDAN]: Same and in other things.

22 Q [MR. SWIFT]: How was it better?

23 A [MR. HAMDAN]: It was better because they gathered about 20 of

1 us in one tent.

2 Q [MR. SWIFT]: How was it worse?

3 A [MR. HAMDAN]: The interrogations and the soldiers.

4 Q [MR. SWIFT]: What happened?

5 A [MR. HAMDAN]: Which time?

6 Q [MR. SWIFT]: Generally in Bagram can you describe the
7 interrogations?

8 MJ [CAPT ALLRED]: Did you say Bagram or Kandahar?

9 CDC [MR. SWIFT]: Excuse me, my mistake.

10 Q [MR. SWIFT]: Generally in Kandahar can you describe the
11 interrogations?

12 A [MR. HAMDAN]: In Kandahar if the interrogator likes you he
13 will treat you well, if he doesn't like you he will treat you very
14 bad.

15 Q [MR. SWIFT]: Were you ever treated very badly?

16 A [MR. HAMDAN]: Yes.

17 Q [MR. SWIFT]: How so?

18 A [MR. HAMDAN]: He threatened to kill me.

19 Q [MR. SWIFT]: When was this?

20 A [MR. HAMDAN]: When I was in Kandahar.

21 Q [MR. SWIFT]: What else if anything?

22 A [MR. HAMDAN]: They also take you to a solitary confinement if
23 they want to.

1 Q [MR. SWIFT]: What was the temperature in solitary
2 confinement?

3 A [MR. HAMDAN]: When I was there it was very hot.

4 Q [MR. SWIFT]: Did anything else happen to you while you were
5 being interrogated in Kandahar?

6 A [MR. HAMDAN]: I do not remember.

7 CDC [MR. SWIFT]: One moment Your Honor.

8 **[Mr. Swift conversing at defense table.]**

9 CDC [MR. SWIFT]: I have no further questions at this time, Your
10 Honor.

11 MJ [CAPT ALLRED]: Okay. This looks like it may be a good time
12 to take a lunch break then, if an hour is sufficient. How long do
13 you expect--well we still have cross-examination?

14 CDC [MR. SWIFT]: Yes.

15 MJ [CAPT ALLRED]: After lunch and then Dr. Keram for an hour or
16 so?

17 CDC [MR. SWIFT]: Probably two. Because I anticipate--part will
18 be on the 706 to an hour on his mental conditions. I would try to be
19 brief I----

20 MJ [CAPT ALLRED]: Try hard or just try lightly?

21 CDC [MR. SWIFT]: And I'm anticipating potentially that the
22 government may call other witnesses if I can have Dr. Keram reserved
23 for recall, if there is any issue that I miss.

1 MJ [CAPT ALLRED]: It's your case it's your call your witness.
2 You do what you need to do I'm just trying to decide whether we
3 should take an hour for lunch or be more generous. Maybe we ought to
4 just take an hour and come back and get back to work.

5 CDC [MR. SWIFT]: Okay.

6 MJ [CAPT ALLRED]: Sounds like there is a lot of work yet for
7 the afternoon. Okay, why don't we reconvene at 1330 shall we do
8 that? The court's in recess.

9 **[The R.M.C. 803 session recessed at 1224, 15 July 2008.]**

10 **[The R.M.C. 803 session was called to order at 1356, 15 July 2008.]**

11 MJ [CAPT ALLRED]: The court is called to order. Does the
12 government have questions for Mr. Hamdan? Before you start can I
13 interrupt for just a moment? The interpreter, the lead interpreter
14 came and spoke to me during the break. Did he come and speak to you
15 folks?

16 CDC [MR. SWIFT]: He did Your Honor.

17 MJ [CAPT ALLRED]: The issue is this; if you want a
18 professional, top right, literal interpretation that slows down the
19 process, it takes more time and may be difficult for Mr. Hamdan to
20 understand. What he and I discussed was the possibility that the
21 defense would actually prefer a more conversational, simple
22 explanation or translation. Did you discuss this issue with him?

1 CDC [MR. SWIFT]: We did Your Honor. And I indicated to him
2 because we have [REDACTED] where if a misunderstanding occurred and
3 he could alert us to that, that I did not have difficulty with that.
4 They cited to me a particular example, which was frustrating to the
5 court and to myself, Papa block.

6 MJ [CAPT ALLRED]: That's a different issue, but it's related I
7 guess. Would you tell him, did you ask him to----

8 CDC [MR. SWIFT]: I told him that I was, I was----

9 MJ [CAPT ALLRED]: ----a more simple----

10 CDC [MR. SWIFT]: ----more simple----

11 MJ [CAPT ALLRED]: Translational interpretation of what's going
12 on.

13 CDC [MR. SWIFT]: And if we have an objection to any we would
14 immediately alert and say I think I'd like that retranslated.

15 MJ [CAPT ALLRED]: I think that will allow us to proceed more
16 quickly and that Mr. Hamdan will understand better and not be
17 confused by words he may not be familiar with and [REDACTED] can be
18 the quality control for the defense. So with respect to the other
19 issue, when the interpreter knows that the Arabic word "baba,"
20 actually means papa; did you ask him to insert that little change on
21 their own or to give a literal translation?

22 CDC [MR. SWIFT]: What I asked is for him to alert the court to
23 as been translated as, the interpreter believes that he means papa

1 and alert the court in that part that the interpreter believes that a
2 literal translation is incorrect when under the understanding of
3 Arabic, under a change they all knew that moment because there is no
4 "P" in Arabic exactly what had happened. And it doesn't make sense
5 to continue what everyone, when we will have to go back and fix it in
6 a little while.

7 MJ [CAPT ALLRED]: Okay, well we agree with that, but the last
8 thing that we discussed was what the interpreter should do when they
9 understand that Mr. Hamdan didn't understand you or didn't understand
10 them whether they should be at liberty simply to repeat to him when
11 they know that it was their interpretation he missed rather than
12 saying back to you, I did not understand. Did you talk about that
13 issue?

14 CDC [MR. SWIFT]: We did and I had no problem with repeating the
15 question a second time, if they need me to repeat it or any witness
16 etc. to indicate I need it repeated so they can remember it, but if
17 they know what they said they just didn't come through clearly and
18 they can say it again.

19 MJ [CAPT ALLRED]: Beautiful.

20 CDC [MR. SWIFT]: No issue.

21 MJ [CAPT ALLRED]: Okay, we have [REDACTED] there as quality
22 control that should make it easier for everyone. Okay with that
23 understanding Commander Stone press forward.

1 TC [LCDR STONE]: Thank you, sir.

2 **CROSS-EXAMINATION**

3 **Questions by the trial counsel:**

4 Q [LCDR STONE]: Mr. Hamdan, you filed a federal paper with Mr.-
5 -then Lieutenant Commander Swift's help in February 2004, correct?

6 A [MR. HAMDAN]: I did not hear the question. He's talking and
7 she's talking at the same time.

8 MJ [CAPT ALLRED]: Why don't you ask your question again?

9 Q [LCDR STONE]: Do you remember filing a paper with the
10 District Court with Mr. Swift's help in February 2004?

11 A [MR. HAMDAN]: You mean the federal court?

12 Q [LCDR STONE]: Yes.

13 A [MR. HAMDAN]: Well, what's the month please?

14 Q [LCDR STONE]: February 2004.

15 A [MR. HAMDAN]: Yes.

16 Q [LCDR STONE]: And Mr. Swift helped you with that document,
17 correct?

18 A [MR. HAMDAN]: Yes.

19 Q [LCDR STONE]: And that document was true, correct?

20 A [MR. HAMDAN]: Yes.

21 Q [LCDR STONE]: I want to shift your attention to your time
22 here in Guantanamo first okay?

23 A [MR. HAMDAN]: Yes.

1 Q [LCDR STONE]: You gave many statements to the Federal Bureau
2 of Investigations, the FBI, correct?

3 A [MR. HAMDAN]: Yes.

4 Q [LCDR STONE]: Do you remember that on many occasions you
5 refused to speak to these people?

6 A [MR. HAMDAN]: Yes.

7 Q [LCDR STONE]: Do you remember the one time that an
8 interrogator or interviewer asked you a question and you stuck your
9 fingers in your ears and refused to answer?

10 A [MR. HAMDAN]: I don't recall.

11 Q [LCDR STONE]: Do you believe that it's something you could
12 have done during this time in 2003?

13 A [MR. HAMDAN]: I do not recall.

14 Q [LCDR STONE]: Very well, do you recall calling some
15 interrogators or interviewers telling them that their questions were
16 stupid?

17 A [MR. HAMDAN]: You mean that I called the interrogator stupid,
18 is that your question?

19 Q [LCDR STONE]: That their question was stupid.

20 A [MR. HAMDAN]: Yes I do remember that I said that.

21 **[END OF PAGE]**

22

23

1 Q [LCDR STONE]: Do you remember telling another interviewer
2 that the only reason you are talking to them is because you got to
3 make a phone call to your wife six months previous?

4 A [MR. HAMDAN]: Repeat the question if you please.

5 Q [LCDR STONE]: Do you remember telling one interviewer that
6 the only reason you would meet with him and answer his questions was
7 because you were given the opportunity to make a phone call to your
8 wife six month earlier?

9 A [MR. HAMDAN]: You mean six months from now?

10 Q [LCDR STONE]: No, when they were asking you questions six
11 months before then you got to make a phone call to your wife and the
12 only reason you were answering those questions is because you got to
13 make that phone call, do you remember that?

14 A [MR. HAMDAN]: I did not understand your question.

15 Q [LCDR STONE]: We can move a little bit here. Would you agree
16 with me that when you refused to speak to these people, these were
17 your decisions?

18 A [MR. HAMDAN]: To speak to the interrogator?

19 Q [LCDR STONE]: To stop speaking to the interrogator or refuse
20 to speak to them when you were in the room?

21 A [MR. HAMDAN]: You are saying this is my own decision?

22

23

1 Q [LCDR STONE]: Yes, they asked you questions and you refused
2 to answer?

3 A [MR. HAMDAN]: Yes, I did refuse.

4 Q [LCDR STONE]: And after you refused the interviews ended,
5 correct?

6 A [MR. HAMDAN]: Of course the interrogation ended.

7 Q [LCDR STONE]: When you arrived in Guantanamo Bay on either
8 April 30 or May 1 of 2002 you wanted to call your wife, didn't you?

9 A [MR. HAMDAN]: When?

10 Q [LCDR STONE]: When you arrived in Guantanamo Bay you wanted
11 to place a phone call to your wife?

12 A [MR. HAMDAN]: Yes.

13 Q [LCDR STONE]: And you let some of the FBI interviewers know
14 that you wanted to place a phone call to your wife, isn't that true?

15 A [MR. HAMDAN]: Yes.

16 Q [LCDR STONE]: And after talking to a couple of interviewers
17 that did not have the opportunity or could not get you a phone call
18 you wanted, Special Agent [REDACTED] was able to get you a phone call
19 with your wife, correct?

20 A [MR. HAMDAN]: Your Honor?

21 MJ [CAPT ALLRED]: Yes.

22 ACC [MR HAMDAN]: The interrogator is talking the same time as
23 the questioning is going on so I cannot understand the question.

1 MJ [CAPT ALLRED]: Thank you, now I'm speaking to the
2 interpreter. It sounds like Mr. Hamdan is hearing your voice in
3 Arabic at the same time he's hearing the question being posed in
4 English, is that what's going on [REDACTED]?

5 DEF INT [REDACTED]: Yes, what he's asking for is what's
6 called consecutive rather than simultaneous translation if they could
7 do it.

8 MJ [CAPT ALLRED]: Let's move to consecutive translation, can we
9 do that rather than try to keep up with the question as it's being
10 posed?

11 CT INT: Yes.

12 MJ [CAPT ALLRED]: Thank you, that's the issue.

13 Q [LCDR STONE]: Special Agent [REDACTED] was able to get you the
14 telephone call that you wanted, isn't that correct?

15 A [MR. HAMDAN]: Yes.

16 Q [LCDR STONE]: That was a big deal for you, that phone call
17 mattered a lot to you, did it not?

18 A [MR. HAMDAN]: Yes.

19 Q [LCDR STONE]: And after the interview--after that phone call
20 you provided substantial amount of information to Special Agent
21 [REDACTED], Special Agent [REDACTED] and Special Agent [REDACTED], correct?

22 A [MR. HAMDAN]: Yes.

1 Q [LCDR STONE]: And the information you provided was accurate
2 information right?

3 A [MR. HAMDAN]: What information are you talking about, what do
4 you mean?

5 Q [LCDR STONE]: What you told Special Agent [REDACTED] Special
6 Agent [REDACTED] and Special Agent [REDACTED] about your history with al
7 Qaeda, Osama bin Laden, the Gulf Arabs, your travel to Tajikistan,
8 your role as Osama bin Laden's bodyguard and driver that information
9 was correct was it not?

10 A [MR. HAMDAN]: Not all of it is correct.

11 Q [LCDR STONE]: Most of it is correct?

12 A [MR. HAMDAN]: I don't think so.

13 Q [LCDR STONE]: You have gone to medical while you have been
14 detained quite a bit, have you not?

15 A [MR. HAMDAN]: Yes.

16 Q [LCDR STONE]: And you have no problem getting medical
17 treatment from the doctors at the camp?

18 A [MR. HAMDAN]: There was--I did not understand your question.

19 Q [LCDR STONE]: You were willing to continue to get medical
20 treatment from the doctors at the detention facility, isn't that
21 correct?

22 A [MR. HAMDAN]: Yes.

1 Q [LCDR STONE]: I'm going to move to the female investigator or
2 interrogator that you spoke about first. Was this an FBI
3 interrogator our military interrogator?

4 A [MR. HAMDAN]: I don't know.

5 Q [LCDR STONE]: Do you remember speaking to your doctor, Dr.
6 Keram about this incident in February of 2008?

7 A [MR. HAMDAN]: Who is Keram?

8 Q [LCDR STONE]: Emily, I'm sorry, do you know Emily, Dr. Emily?

9 A [MR. HAMDAN]: Yes. **[Nodded in the affirmative.]**

10 MJ [CAPT ALLRED]: The answer was yes, he nodded in the
11 affirmative.

12 Q [LCDR STONE]: You told Dr. Emily that this incident took
13 place six months after Special Agent [REDACTED] and Special Agent
14 [REDACTED] interviewed you, is that correct?

15 A [MR. HAMDAN]: I don't recall.

16 Q [LCDR STONE]: Do you remember your affidavit that Mr. Swift
17 helped you with right and we talked about it earlier?

18 A [MR. HAMDAN]: You mean in the civil court?

19 Q [LCDR STONE]: Yes.

20 A [MR. HAMDAN]: Yes.

21 Q [LCDR STONE]: In that affidavit you mentioned several abuse
22 allegations, but you do not mention this, isn't that true?

23 A [MR. HAMDAN]: What incident?

1 Q [LCDR STONE]: When you spoke to Special Agent [REDACTED] and
2 Special Agent [REDACTED] in May of 2003 at times during the interview you
3 were laying down and they were laying down, isn't that true?

4 A [MR. HAMDAN]: No. Do you mean that I was laying down on my
5 back?

6 Q [LCDR STONE]: Yes.

7 A [MR. HAMDAN]: No.

8 Q [LCDR STONE]: And when you were questioned by them you told
9 the truth, isn't that true?

10 A [MR. HAMDAN]: What did he ask me about?

11 Q [LCDR STONE]: He asked if you swore bayat to Osama bin Laden
12 before those questions?

13 CDC [MR. SWIFT]: Objection Your Honor. He's been called for
14 the limited scope of whether the testimony was obtained through
15 coercion not for the substance of the testimony. One does not go
16 into the substance of the testimony. The question was whether it was
17 obtained by coercion. We're happy to give lots of latitude as to the
18 circumstances, but that's the very definition of a limited purpose.

19 TC [LCDR STONE]: First, sir, I'm answering his question,
20 secondly it is a method of impeachment, it's previously said that he
21 didn't tell the truth on a previous occasion with regards to a
22 statement. It goes directly to the Rules of Military Commission 304
23 with regards to truth, veracity and independent reliability in the

1 statement. Furthermore it also has the ability to show bias with
2 regards to this accused and his connections with al Qaeda, Osama bin
3 Laden, Mohammed Ateff, and the rest. And it also has the possibility
4 of corroborating the statement independently, which would then allow
5 its admissibility. So it's an absolutely perfectly acceptable
6 question and I think one the detainee would like to answer.

7 CDC [MR. SWIFT]: Your Honor, if counsel's recitation of what
8 the purpose in the limited call was for then there would be no such
9 thing as calling a witness for a limited purpose.

10 MJ [CAPT ALLRED]: Well, I think when you call the witness for a
11 limited purpose that means that you are limiting the scope of your
12 questioning and that his answers won't be later used against him in
13 the merits. You've raised by your direct examination an inference
14 that these questions were taken--that these interrogations were
15 conducted under coercive circumstances and it seems fair to me for
16 the prosecutor to show either that it's not true or the statements
17 were not affected by the coercive circumstances. So I'll overrule
18 your objection for now, you can remake it later, if you think he
19 strays too far.

20 CDC [MR. SWIFT]: Yes, Your Honor.

21 [END OF PAGE]
22
23

1 Q [LCDR STONE]: One of the things that you, the three of you
2 spoke about was the term "bayat" with al Qaeda, yourself, and Osama
3 bin Laden; do you member that conversation?

4 A [MR. HAMDAN]: He talked about it not me.

5 Q [LCDR STONE]: Did you answer any questions?

6 A [MR. HAMDAN]: Who was talking--he was talking to me what do
7 you want me to answer, he was talking to me and he was answering
8 himself.

9 Q [LCDR STONE]: So you answered no questions during this
10 interview?

11 A [MR. HAMDAN]: Why don't you just specify your question? You
12 talk about allegiance and you also talk about different topic right
13 now.

14 Q [LCDR STONE]: Is your testimony that you did not speak to
15 these agents about your allegiance to Osama bin Laden?

16 A [MR. HAMDAN]: I did not talk about allegiance to Osama bin
17 Laden.

18 Q [LCDR STONE]: Did you speak to them about your role as a
19 bodyguard and driver for Osama bin Laden?

20 A [MR. HAMDAN]: No.

21 Q [LCDR STONE]: Do you remember anything that you spoke about
22 with regards to this conversation?

23 A [MR. HAMDAN]: No, I didn't talk to them, no.

1 Q [LCDR STONE]: I'm going to switch topics on you for a minute;
2 you talked about being in Papa block, Baba block. When you were in
3 Baba block you have some of your friends in a block too, isn't that
4 right, Sudanese?

5 A [MR. HAMDAN]: They were detained at the same block.

6 Q [LCDR STONE]: And you had the ability to speak with them?

7 A [MR. HAMDAN]: The ones who were with me in the block?

8 Q [LCDR STONE]: Yes.

9 A [MR. HAMDAN]: Yes.

10 Q [LCDR STONE]: And these were the original six individuals
11 that were going to be tried at the first military commissions
12 correct?

13 A [MR. HAMDAN]: Yes.

14 Q [LCDR STONE]: Yet at some point if it was in October of 2005
15 you were removed from Camp Four, right?

16 DEF INT [REDACTED]: Mistranslation. **[Holds up four fingers**
17 **for Camp Four.]**

18 Q [LCDR STONE]: You were removed from Camp Four because you
19 were determined to have been the instigator?

20 A [MR. HAMDAN]: Yes I went back in 2005 to Camp Four.

21 **[END OF PAGE]**

22

23

1 Q [LCDR STONE]: You spent roughly 36 days in Camp Four,
2 correct?

3 A [MR. HAMDAN]: I don't know exactly the number of days I spent
4 there but it is about less than what you have specified.

5 Q [LCDR STONE]: Okay, can we agree on about a month?

6 A [MR. HAMDAN]: Almost, yes.

7 Q [LCDR STONE]: And you were removed from Camp Four because the
8 guard force had said you failed to comply with their orders that you
9 had harassed the guards?

10 A [MR. HAMDAN]: Is the question over?

11 Q [LCDR STONE]: No, I have a red light; waiting for the green
12 light thank you. And that you were the individual that instigated or
13 started disturbance, isn't that correct?

14 A [MR. HAMDAN]: No.

15 Q [LCDR STONE]: That's what the guards said, isn't that
16 correct?

17 A [MR. HAMDAN]: He can say whatever he wants.

18 Q [LCDR STONE]: But that is what you understand that he said
19 not that you agree with it?

20 A [MR. HAMDAN]: I do not understand your question.

21 **[END OF PAGE]**

22

23

1 Q [LCDR STONE]: I understand that you don't agree with the
2 guards, but----

3 A [MR. HAMDAN]: There's a problem here she is now coming in at
4 the same as the interrogator is talking, and I don't understand, and
5 I can't understand what is the exact question.

6 Q [LCDR STONE]: I understand that you don't agree with the
7 guards, but that's what the guards said?

8 A [MR. HAMDAN]: And I go back to the room?

9 Q [LCDR STONE]: And then you were transferred to Camp Five
10 after that incident?

11 A [MR. HAMDAN]: The whole question is confusing now it's upside
12 down. You're asking me about the soldier, the fourth camp, and the
13 fifth camp, I don't know what the question is right now. Can you
14 please repeat the question from the very beginning?

15 Q [LCDR STONE]: From the very beginning, I think I'll speak to
16 the middle.

17 A [MR. HAMDAN]: Just that question.

18 Q [LCDR STONE]: I can move on because it's not that important
19 we are spending too much time.

20 MJ [CAPT ALLRED]: Okay, next question.

21 Q [LCDR STONE]: In February of 2008 you met Dr. Emily and spoke
22 to her correct?

23 DEF INT [REDACTED]: 2008.

1 A [MR. HAMDAN]: Yes, I did talk to Dr. Emily, yes I did.

2 Q [LCDR STONE]: And you told her that Camp Five is now noisy,
3 isn't that true?

4 A [MR. HAMDAN]: Yes.

5 Q [LCDR STONE]: Because the detainees talk to each other in
6 loud voices?

7 A [MR. HAMDAN]: No.

8 Q [LCDR STONE]: Detainees don't talk to each other in loud
9 voices in Camp Five?

10 A [MR. HAMDAN]: Yes they do but your question was in a
11 different direction.

12 Q [LCDR STONE]: Switch topics again, I want to talk about your
13 capture okay?

14 A [MR. HAMDAN]: Yes.

15 Q [LCDR STONE]: Do you remember speaking to two FBI agents here
16 at Guantanamo about your capture? Do you remember that?

17 A [MR. HAMDAN]: That I spoke to two FBI agents here in Cuba?

18 Q [LCDR STONE]: That's correct.

19 A [MR. HAMDAN]: I talked to too many people, I really don't
20 know where they are from?

21 Q [LCDR STONE]: But you talked to two FBI agents in Cuba about
22 your capture specifically, do you remember that?

23 A [MR. HAMDAN]: I told you I talked to too many people.

1 Q [LCDR STONE]: Would it surprise you that in those interviews
2 they reported that you told them nothing about being beaten at
3 Takteh-Pol? Would that surprise you?

4 A [MR. HAMDAN]: I told them that they were beating me.

5 Q [LCDR STONE]: Do you remember your civil court affidavit that
6 we talked about earlier, right?

7 A [MR. HAMDAN]: Yes, yes.

8 Q [LCDR STONE]: You did not mention anything in it about being
9 beaten in Takteh-Pol either did you?

10 A [MR. HAMDAN]: I don't recall what's written in the affidavit.

11 Q [LCDR STONE]: When you met Dr. Emily in 2005 you told her
12 that you were only struck by the people who captured you and that was
13 when you had run away from the roadblock, isn't that also true?

14 A [MR. HAMDAN]: Yes.

15 Q [LCDR STONE]: And then again in 2006 you didn't mention to
16 her anything about being beaten, only that you were captured there,
17 isn't that also true?

18 A [MR. HAMDAN]: I don't recall maybe she didn't ask me, I don't
19 recall.

20 Q [LCDR STONE]: What did you learn that American Special Forces
21 were on scene when you were captured, when did you learn that?

22 A [MR. HAMDAN]: The third day.

23

1 Q [LCDR STONE]: When?

2 A [MR. HAMDAN]: The third day.

3 Q [LCDR STONE]: The third day, okay. So you did not know until

4 the third day that Americans were there when you were captured?

5 A [MR. HAMDAN]: Yes.

6 Q [LCDR STONE]: When you were interrogated by the interrogator

7 that was an American you admitted to having missiles in your car,

8 isn't that correct?

9 A [MR. HAMDAN]: I didn't have such a thing in the car.

10 Q [LCDR STONE]: I couldn't hear the----

11 A [MR. HAMDAN]: I didn't have such a thing in the car.

12 Q [LCDR STONE]: But you told the interrogator on the videotape

13 that you did, isn't that true?

14 A [MR. HAMDAN]: As I saw the videotape, yes.

15 Q [LCDR STONE]: And you never told the interrogator in Takteh-

16 Pol that you made up the story about having missiles because somebody

17 threatened you, did you?

18 A [MR. HAMDAN]: No I didn't tell them because I didn't talk to

19 the interrogators.

20 Q [LCDR STONE]: But you told Dr. Emily in 2008 that they

21 threatened you to lie about the missiles, isn't that true?

22 A [MR. HAMDAN]: I said that to Dr. Emily?

23

1 Q [LCDR STONE]: Yes.

2 A [MR. HAMDAN]: I do not recall, I don't recall.

3 Q [LCDR STONE]: You did lie to the interrogator though about
4 saying that you are only associated with al Wafa relief agency,
5 didn't you?

6 A [MR. HAMDAN]: Yes.

7 Q [LCDR STONE]: And you changed your story to the interrogator
8 several times?

9 A [MR. HAMDAN]: Yes. Can you please tell me what did you say
10 about the way I nodded my head?

11 Q [LCDR STONE]: Just that you nodded affirmatively for the
12 record because everything is being taped when they review it someone
13 will know that you went, "yes."

14 MJ [CAPT ALLRED]: He also orally responded to that question, I
15 don't think you heard it, but I heard the interpreter say "yes."

16 Q [LCDR STONE]: Now, isn't it true that after you were in the
17 American Special Forces and Afghan custody one of the Afghans
18 actually kissed you on the cheek to calm you down?

19 A [MR. HAMDAN]: I don't think so.

20 Q [LCDR STONE]: They did give you a prayer rug and the Koran
21 for a short period of time?

22 A [MR. HAMDAN]: Who?

1 Q [LCDR STONE]: One of the Afghans gave you a prayer rug and a
2 Koran while you were detained in Takteh-Pol and then it was taken
3 away from you shortly thereafter? Do you remember that?

4 A [MR. HAMDAN]: This didn't happen.

5 Q [LCDR STONE]: At one point you asked to be put back with Said
6 Boujaadia and they put you back together, isn't that true?

7 A [MR. HAMDAN]: I asked you who?

8 Q [LCDR STONE]: The American and Afghan guards that were
9 watching you after they separated you?

10 A [MR. HAMDAN]: To ask to be put with Said?

11 Q [LCDR STONE]: To be held together with him instead of
12 separately?

13 A [MR. HAMDAN]: No I didn't ask.

14 Q [LCDR STONE]: Your defense counsel previously filed in this
15 commission a document that said the same interrogator from Takteh-Pol
16 went with you to the Panjshir valley, is that true?

17 DEF INT [REDACTED]: She said the lawyer went with him to
18 Panjshir.

19 CT INT: The interpreter did not hear the question.

20 MJ [CAPT ALLRED]: He didn't understand the question. She used
21 the word lawyer instead of interrogator?

22 DEF INT [REDACTED]: Yes.

23 MJ [CAPT ALLRED]: Okay, why don't you try it again?

1 Q [LCDR STONE]: Did the interrogator from Takteh-Pol travel
2 with you to the Panjshir valley?

3 A [MR. HAMDAN]: To Bagram.

4 Q [LCDR STONE]: English.

5 A [MR. HAMDAN]: To Bagram.

6 Q [LCDR STONE]: After Bagram when you went to the--what you
7 described as the Afghan place, did he go there with you?

8 A [MR. HAMDAN]: Who, who went with me?

9 Q [LCDR STONE]: Did the interrogator from Takteh-Pol?

10 A [MR. HAMDAN]: The last time that he was with me was in the
11 airplane and then they put me in the car we took off and I don't know
12 who was with me in the car.

13 Q [LCDR STONE]: When you were in the airplane after you left
14 Takteh-Pol you complained that the handcuffs with the flex cuffs were
15 too tight, isn't that true?

16 A [MR. HAMDAN]: It was my back not my hands.

17 Q [LCDR STONE]: And they--but they loosened your hands so
18 you're back would not hurt so bad, isn't that true, because of the
19 position you are being put in?

20 A [MR. HAMDAN]: I was on my stomach, they put me on my stomach
21 and my hands were tied behind my back and they had tied me another
22 way.

1 Q [LCDR STONE]: But they loosened--maybe we should just do this
2 in English.

3 A [MR. HAMDAN]: My hands were behind my back I talked to them
4 so they took my hands were behind my back and put them in front.

5 Q [LCDR STONE]: And that helped a little bit of the back pain?

6 A [MR. HAMDAN]: Yes.

7 Q [LCDR STONE]: You told Dr. Keram, I'm sorry, Dr. Emily in
8 February of 2008 that you have nightmares from being held in a room
9 in Bagram where you were isolated and threatened, is that true?

10 A [MR. HAMDAN]: 2002 in Bagram.

11 DEF INT [REDACTED]: Can you repeat?

12 Q [LCDR STONE]: Try again.

13 A [MR. HAMDAN]: 2002 in Bagram.

14 Q [LCDR STONE]: Correct. Well, December 28, 2001 through
15 January 2002 in Bagram is the time that you were in Bagram, but isn't
16 it true you told Dr. Emily this year that you were held in a room
17 isolated and threatened and that gives you nightmares. Was that
18 statement to Dr. Emily true?

19 A [MR. HAMDAN]: The whole question confuses me 2002, 2001 and
20 then you say I was in Bagram in 2001, how does that work?

21 [END OF PAGE]

1 Q [LCDR STONE]: Let's start over. Did you tell Dr. Emily that
2 when you were in Bagram that you were held in a room isolated and
3 threatened, did you tell her that?

4 A [MR. HAMDAN]: Yes.

5 Q [LCDR STONE]: Is that true, you were held in Bagram in
6 isolation?

7 A [MR. HAMDAN]: Yes, I was alone, yes.

8 Q [LCDR STONE]: So the statement that was made to Dr. Emily in
9 2005 that you saw detainees beaten on the tarmac in Bagram that is a
10 lie, correct?

11 A [MR. HAMDAN]: What airport?

12 Q [LCDR STONE]: In Bagram.

13 A [MR. HAMDAN]: I saw people being beaten in Bagram in front of
14 me, is that the question?

15 Q [LCDR STONE]: Right, is that true or not?

16 A [MR. HAMDAN]: No I didn't see anybody being beaten in front
17 of me.

18 Q [LCDR STONE]: So if Dr. Emily has that in her notes that
19 would be strange?

20 A [MR. HAMDAN]: It's not strange, you know why?

21 Q [LCDR STONE]: Why?

22 A [MR. HAMDAN]: Because the detainees had told me about this
23 and I had told her about it.

1 Q [LCDR STONE]: The detainees, other detainees told you, but
2 you didn't see this, is that true?

3 A [MR. HAMDAN]: Yes, yes.

4 Q [LCDR STONE]: And it's also true then that you didn't see a
5 person killed in Bagram, right?

6 A [MR. HAMDAN]: Yes.

7 Q [LCDR STONE]: But detainees told you that there was a death
8 from a beating in Bagram?

9 A [MR. HAMDAN]: Yes, yes.

10 Q [LCDR STONE]: When you were in Kandahar your, you testified
11 that individuals threatened to kill you, investigators, correct?

12 A [MR. HAMDAN]: Yes.

13 Q [LCDR STONE]: Now, in the affidavit you said these threats
14 occurred when you took the FBI agents on the tour of Khandahar is
15 this when those threats took place?

16 A [MR. HAMDAN]: I did not understand the question.

17 Q [LCDR STONE]: You testified that people, investigators
18 threatened to kill you in Kandahar right, you said that earlier
19 today, true?

20 A [MR. HAMDAN]: Yes.

21 Q [LCDR STONE]: My question is did those threats occur when you
22 took FBI agents on a tour of Kandahar?

23 A [MR. HAMDAN]: Before I took them.

1 Q [LCDR STONE]: But by them?

2 A [MR. HAMDAN]: The interpreter did not understand.

3 Q [LCDR STONE]: I'm sorry, but the threats were done by the FBI
4 agents, is that your testimony?

5 A [MR. HAMDAN]: I told you I don't know if they are FBI or
6 whatever they are they told me that they are interrogators and they
7 never told me where they were from.

8 Q [LCDR STONE]: Let's try it this way. It was the same people
9 that you took on the tour of Kandahar that threatened you, right?

10 A [MR. HAMDAN]: The first time yes.

11 Q [LCDR STONE]: Your civil court documents says one of the
12 people on the tour threatened you by putting a gun----

13 MJ [CAPT ALLRED]: Commander Stone, he's already said twice that
14 he doesn't remember specifically what was in that affidavit. Is
15 there any way that we can avoid another running into a brick wall
16 situation?

17 Q [LCDR STONE]: I can rephrase it. When you went on a tour in
18 Kandahar with the Americans that you led around did any of them put a
19 gun on a table and threaten you with it?

20 A [MR. HAMDAN]: Inside the car? Inside the car? The table is
21 inside the car? You're saying that.

1 Q [LCDR STONE]: Please translate these words. One of their
2 methods to threaten was to put a pistol on the table in front of me
3 and show me the gun and ask what do you think?

4 A [MR. HAMDAN]: Yes.

5 Q [LCDR STONE]: Is that the only threat that you are talking
6 about in Kandahar?

7 A [MR. HAMDAN]: No.

8 Q [LCDR STONE]: Now you agreed to take these people on a
9 sightseeing tour of Kandahar to show them some places where you had
10 driven Osama bin Laden, isn't that true?

11 A [MR. HAMDAN]: I took the Americans to the places where bin
12 Laden used to be, is that your question?

13 Q [LCDR STONE]: That's the first part, you did that and you
14 voluntarily did it, isn't that also true?

15 A [MR. HAMDAN]: Of course under threat because I was
16 threatened. I did not do this on my own.

17 Q [LCDR STONE]: Now you have a close relationship or had a
18 close relationship with Osama bin Laden, isn't that true?

19 A [MR. HAMDAN]: No.

20 Q [LCDR STONE]: No. Isn't it true that you are one of the
21 three closest people to him after the East African embassy bombings?

22 A [MR. HAMDAN]: Not true.

1 Q [LCDR STONE]: Isn't it true that you lived next door to him
2 in Kandahar?

3 A [MR. HAMDAN]: Not within the same compound where he used to
4 live. It is a very small town you can walk it on foot.

5 Q [LCDR STONE]: Abu Jandal is your brother-in-law, correct?

6 A [MR. HAMDAN]: No.

7 Q [LCDR STONE]: He is not?

8 DEF INT [REDACTED]: Terms.

9 A [MR. HAMDAN]: My brother-in-law.

10 Q [LCDR STONE]: When his son was born isn't it true that you
11 took his son before his mother grabbed him or held them and took them
12 to Osama bin Laden so Osama bin Laden could read the call to prayer
13 and feed him with dates, isn't that true?

14 CDC [MR. SWIFT]: I'm going to object to this point what does
15 this have to do with either the veracity of his story you know within
16 the scope of whether stories are whether----

17 MJ [CAPT ALLRED]: What's your objection in a word?

18 CDC [MR. SWIFT]: It's beyond the scope with a limited purpose
19 for which he was called.

20 MJ [CAPT ALLRED]: What's your answer?

21 TC [LCDR STONE]: My answer is it still goes to impeachment as
22 well as bias with respect to the allegations as well as in light of
23 the fact that.

1 MJ [CAPT ALLRED]: Okay. The objection is sustained. We're a
2 little bit far afield here.

3 Q [LCDR STONE]: As a member of al Qaeda you are trained to
4 complain about mistreatment and torture is that not true?

5 A [MR. HAMDAN]: Your first part of the question said that as a
6 member of al Qaeda is that true?

7 Q [LCDR STONE]: Yes.

8 A [MR. HAMDAN]: That's not true.

9 Q [LCDR STONE]: If you are not a member of al Qaeda why was
10 your name found on a list, in the bombed out rubble of Abu Hafs al
11 Masri house?

12 A [MR. HAMDAN]: Any person can write whatever they want you to
13 write my name in any piece of paper you want.

14 Q [LCDR STONE]: On the same list with Osama bin Laden, Abu Hafs
15 al Masri?

16 A [MR. HAMDAN]: You can write my name on the American President
17 George Bush see.

18 MJ [CAPT ALLRED]: He's not going to be able to explain why his
19 name was found there. Let's move on.

20 Q [LCDR STONE]: He won't explain why.

21 MJ [CAPT ALLRED]: Okay, he won't.

22 A [MR. HAMDAN]: It's not that I refuse the question here, Your
23 Honor.

1 MJ [CAPT ALLRED]: Very well, thank you.

2 Q [LCDR STONE]: Do you believe that you helped the Americans in
3 Afghanistan in every way?

4 A [MR. HAMDAN]: Yes.

5 Q [LCDR STONE]: Okay. When the American soldiers captured you
6 they asked you for tactical battlefield information, correct?

7 A [MR. HAMDAN]: The Afghani people are the ones who captured
8 me.

9 Q [LCDR STONE]: The interrogator that was on the video that
10 followed you onto the airplane and then had your handcuffs, your arms
11 moved from the back to the front that person he asked for tactical
12 information regarding al Qaeda forces in Kandahar, correct?

13 A [MR. HAMDAN]: I don't understand your question; even the
14 translator does not understand you.

15 Q [LCDR STONE]: Khalid Sheikh Mohammed----

16 A [MR. HAMDAN]: Give me one minute; this question is very long.
17 Why don't you say half of the question so the translator can
18 translate; give him a chance so I can understand you.

19 Q [LCDR STONE]: I can do that.

20 A [MR. HAMDAN]: Mr. Judge, please say something so I can
21 understand you.

22 MJ [CAPT ALLRED]: That's sounds like a fair request. Break the
23 question down, and we might have better luck.

1 Q [LCDR STONE]: You were captured on November 24, 2001, right?

2 A [MR. HAMDAN]: Yes in that month.

3 Q [LCDR STONE]: Khalid Sheikh Mohammed says he sent you on a

4 mission south of Kandahar in which when you returned you were

5 captured is that true?

6 A [MR. HAMDAN]: No.

7 Q [LCDR STONE]: So Khalid Sheikh Mohammed is lying.

8 A [MR. HAMDAN]: I didn't say that.

9 Q [LCDR STONE]: So then you went on your own to drop off----

10 MJ [CAPT ALLRED]: Why are we talking about this trip south of

11 Kandahar? This was before the capture before any of the statements

12 were made.

13 TC [LCDR STONE]: Well, I'm moving into the tactical piece of

14 the fact that Khalid Sheikh Mohammed was in Kandahar and----

15 MJ [CAPT ALLRED]: Well, ask him those questions.

16 Q [LCDR STONE]: You did not----

17 MJ [CAPT ALLRED]: You have the statements right, are there

18 written statements that were made that we can look at and see what he

19 was asked about.

20 TC [LCDR STONE]: Yes.

21 MJ [CAPT ALLRED]: Okay, go ahead then.

1 Q [LCDR STONE]: You didn't give critical important information
2 to the United States about al Qaeda when you could have, isn't that
3 true?

4 A [MR. HAMDAN]: How, I didn't understand your words.

5 Q [LCDR STONE]: When you were captured Saif al Adel was still a
6 defender of Kandahar correct?

7 A [MR. HAMDAN]: He was in Kandahar, yes, what's defender?

8 Q [LCDR STONE]: And he was a member of the al Qaeda Shura
9 counsel correct?

10 A [MR. HAMDAN]: I asked you what is this word about the
11 defender.

12 Q [LCDR STONE]: He was organizing al Qaeda forces to attack
13 Americans who may enter Kandahar correct?

14 A [MR. HAMDAN]: I'm not aware of this thing. I know that he's
15 in charge of the security guards or the security reason of al Qaeda.

16 Q [LCDR STONE]: Didn't you tell Special Agent [REDACTED] on August
17 4, 2002 that Saif al Adel was leader of the defense of Kandahar?

18 A [MR. HAMDAN]: No I didn't say this at all.

19 Q [LCDR STONE]: And Khalid Sheikh Mohammed was in Kandahar as
20 well, isn't that true?

21 A [MR. HAMDAN]: I do not remember.

22

1 Q [LCDR STONE]: You knew where weapons storage facilities were
2 in Kandahar isn't that true?

3 A [MR. HAMDAN]: Excuse me, what is the question?

4 Q [LCDR STONE]: You also knew where weapons storage facilities
5 for al Qaeda and Taliban were located in the city of Kandahar, isn't
6 that true?

7 A [MR. HAMDAN]: It was known yes, it was in Kandahar any human
8 being would know about it and it's very old ever since the Russians
9 were there.

10 Q [LCDR STONE]: Saif al Adel told you about his plan to use al
11 Qaeda forces as cells to kill U.S. service members when they entered
12 Kandahar; isn't that true?

13 A [MR. HAMDAN]: No.

14 Q [LCDR STONE]: So you did not tell [REDACTED] that and Special
15 Agent [REDACTED] on August 4, 2002?

16 A [MR. HAMDAN]: No, I don't think so.

17 Q [LCDR STONE]: Is it also true that you were aware of al
18 Qaeda's propensity to use surface-to-air missiles to defend Kandahar
19 from the oncoming American airplanes?

20 A [MR. HAMDAN]: I didn't know this thing.

21 [END OF PAGE]

1 Q [LCDR STONE]: To travel to Al Farouk training camp with Osama
2 bin Laden----

3 MJ [CAPT ALLRED]: Where are we going with this? We're talking
4 about the statements that he made.

5 TC [LCDR STONE]: These are all statements that he made.

6 MJ [CAPT ALLRED]: Okay. We're talking about whether or not
7 they were made voluntarily or under coercive circumstances?

8 TC [LCDR STONE]: Well he already said that they were not
9 coerced that they were made voluntarily.

10 MJ [CAPT ALLRED]: Okay.

11 Q [LCDR STONE]: You knew all of these things when you were
12 captured and you did not tell the U.S. forces, correct?

13 A [MR. HAMDAN]: What are the things?

14 Q [LCDR STONE]: All of the ones we just listed.

15 A [MR. HAMDAN]: You spoke about many things some things were
16 not involved sometimes you say agenda what kind of relationship, be
17 specific.

18 Q [LCDR STONE]: I think I can wrap it up with just one more
19 question. Do you still believe that you helped the United States in
20 every way as your affidavit says?

21 A [MR. HAMDAN]: Yes I helped.

22 TC [LCDR STONE]: Thank you, sir.

1 MJ [CAPT ALLRED]: Okay. That looks at the end of cross-
2 examination.

3 CDC [MR. SWIFT]: Let's take a break.

4 MJ [CAPT ALLRED]: Yes, I think it's time for a recess. Why
5 don't we--15 minutes.

6 **[The R.M.C. 803 session recessed at 1523, 15 July 2008.]**

7 **[The R.M.C. 803 session was called to order at 1543, 15 July 2008.]**

8 MJ [CAPT ALLRED]: The court's called to order. Mr. Hamdan has
9 returned to his chair at counsel table. I guess there is no
10 redirect.

11 CDC [MR. SWIFT]: That is correct Your Honor.

12 MJ [CAPT ALLRED]: Okay.

13 CDC [MR. SWIFT]: Dr. Keram is going to take in my estimation an
14 hour and a half.

15 MJ [CAPT ALLRED]: This is with light efforts to go quickly or
16 with extensive efforts?

17 CDC [MR. SWIFT]: That's good efforts to go quickly.

18 MJ [CAPT ALLRED]: The medium good efforts standard.

19 CDC [MR. SWIFT]: Well I think that's a nice compromise, sir.

20 MJ [CAPT ALLRED]: Well let's talk now about an issue that
21 sometimes comes up and that is the prayer schedule. I'm not
22 particularly focused on that and I don't try specifically to recess
23 in time for prayers, but if the defense wants to assert that right, I

1 will call upon you to tell me what your preference is and schedule
2 your case so we can do it efficiently.

3 CDC [MR. SWIFT]: I will do that, sir, and have been thinking
4 about it. I got caught up short this morning because my client was
5 on the stand when lunch happened and decided that it wasn't
6 appropriate to talk to them and from now on we will discuss and try
7 and let your honor know what's necessary in the prayer schedule. And
8 I haven't had a lot of time talking about it, so I'll talk to him
9 after we break this evening and will let you know what's up.

10 MJ [CAPT ALLRED]: Well it's quarter to four. I'm prepared to
11 stay till five or so tonight so why don't we call Dr. Emily as she's
12 known by those who know her best and we can get done this afternoon.

13 CDC [MR. SWIFT]: My client advises me that as far as today goes
14 the next prayer he'll delay until he is back in the camp and we can
15 proceed without any delays.

16 MJ [CAPT ALLRED]: Fair enough as you wish. Trial Counsel, you
17 swear the witness.

18 **[END OF PAGE]**

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23

1 DR EMILY KERAM, civilian, was called as a witness for the defense and
2 sworn and testified as follows:

3 DIRECT EXAMINATION

4 Questions by defense counsel:

5 Q [MR. SWIFT]: Dr. Keram, we previously furnished to the court
6 your curriculum vitae, but again it was furnished in the area of
7 electronics do you have a current copy of your curriculum vitae?

8 A [DR KERAM]: I can print you one at the break, you can have
9 the current copy of the----

10 MJ [CAPT ALLRED]: I looked at that curriculum vitae and
11 remember that Dr. Keram being a very experienced, capable and
12 distinguished practitioner of the art of forensic psychiatry so I
13 don't think you need to lay a foundation here for her status as an
14 expert witness.

15 CDC [MR. SWIFT]: I will lay the very brief foundation into
16 three areas Your Honor, I----

17 MJ [CAPT ALLRED]: For my benefit?

18 CDC [MR. SWIFT]: Yes actually for your benefit and I just want
19 to highlight three areas.

20 MJ [CAPT ALLRED]: Okay, the government is waving off on the
21 foundation as well.

22 CDC [MR. SWIFT]: I understand, I'll keep them very brief.

1 Q [MR. SWIFT]: You're qualified in forensic psychiatry is that
2 correct?

3 A [DR KERAM]: Yes.

4 Q [MR. SWIFT]: What are your competencies particularly in
5 forensic psychiatry?

6 A [DR KERAM]: I have an expertise in the field of posttraumatic
7 stress disorder, major depression, correctional psychiatry,
8 competency to stand trial evaluations and insanity defense
9 evaluations.

10 Q [MR. SWIFT]: In PTSD what particular experience clinically
11 beyond your forensic qualifications do you have?

12 A [DR KERAM]: In 1996, I joined the staff of the VA and was the
13 medical director of a mental health clinic for four years. And then
14 left for four years to become a full-time professor of medicine, and
15 then went back in 2004 and I've been there since that time at the VA
16 in a half-time position. During that time I've treated between 700
17 and one thousand patients with posttraumatic stress disorder. Most
18 of them with combat stress, posttraumatic stress disorder, a majority
19 of the rest of them either PTSD related to sexual trauma in both male
20 and female veterans or in having their trauma resulting from being in
21 conditions of confinement either POWs or in American briggs.

22

23

1 Q [MR. SWIFT]: In the field of correctional psychiatry what
2 practical experience do you have?

3 A [DR KERAM]: I spent a year as a fellow in forensic psychiatry
4 with the US Department of Justice and the Federal Bureau of prisons
5 at FCI Butner. I've worked on both general populations up through
6 custodial levels including death row at the maximum security facility
7 for women in North Carolina. And since I moved to California in 1992
8 I've been a consultant either court appointed or working as a defense
9 or prosecution consultant and a number of federal and state jails or
10 pre-detention facilities in California.

11 Q [MR. SWIFT]: Did those include San Quentin and other high-
12 security prisons?

13 A [DR KERAM]: San Quentin is the only high-security prison in
14 California.

15 Q [MR. SWIFT]: How many times have you testified?

16 A [DR KERAM]: I finished my forensic training in '92 and since
17 that time I've testified approximately 30 times.

18 Q [MR. SWIFT]: Do you testify consistently for the prosecution
19 and the defense?

20 A [DR KERAM]: No, I think that when I testified it's in equal
21 numbers depending on a court appointed basis or as a defense or
22 prosecution expert.

1 Q [MR. SWIFT]: In this case what have you done to prepare for
2 testimony?

3 A [DR KERAM]: Reviewed the medical and custodial records,
4 reviewed the video tape of Mr. Hamdan from November of 2001. Because
5 I was not familiar with Arab culture--I'm sorry, I'm very sorry I'm
6 from New York so you're going to have to slow me down a few times or
7 I--suddenly to a slower rhythm. I asked our translator to provide me
8 with references that I might read in order to become more comfortable
9 in understanding Arab culture. And I also asked him if he could
10 identify an Arab and preferably a Yemeni psychologist with whom I
11 might be able to consult about particular aspects of this case. I
12 met with Mr. Hamdan and interviewed him over the last--I first met
13 him in March of 2005 and I've spent over a hundred hours with him on
14 six occasions, six visits to Guantanamo on approximately 16 days
15 since that time.

16 I've also consulted with other forensic psychiatrists
17 regarding issues that came up in the case that were presented to me
18 for evaluation, assessment and opinion.

19 Q [MR. SWIFT]: As an expert, is consulting with other forensic
20 psychiatrist a normal practice in those times when you testified?

21 A [DR KERAM]: In routine cases, after one has you know enough
22 experience we tend not to do that, but in cases that are out of the
23 ordinary it's recommended that we do that.

1 Q [MR. SWIFT]: And does that mean outpost guidelines or
2 preparation for forensic?

3 A [DR KERAM]: Well, it's certainly something that we teach.
4 I'm on the faculty of a training program for forensic psychiatrists
5 and it's certainly something that accredited, that we teach our
6 fellows to do.

7 Q [MR. SWIFT]: Have you been paid for your work on this case?

8 A [DR KERAM]: Yes I have.

9 Q [MR. SWIFT]: Have you reached each of the opinions regarding
10 Mr. Hamdan's diagnosis regarding potential treatment?

11 A [DR KERAM]: Yes.

12 Q [MR. SWIFT]: Have you interference with counsel?

13 A [DR KERAM]: Yes.

14 Q [MR. SWIFT]: regarding whether his statements were obtained
15 while in Guantanamo Bay with the product of coercion?

16 A [DR KERAM]: Yes.

17 Q [MR. SWIFT]: Have you reached each of these opinions to the
18 degree to a very reasonable medical certainty?

19 A [DR KERAM]: Yes.

20 [END OF PAGE]

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22

23

1 Q [MR. SWIFT]: We would ask that Dr. Keram be qualified as
2 expert forensic psychiatry in specifically posttraumatic stress
3 disorder and his treatment and penal psychiatry with regards to
4 coercion?

5 TC [LCDR STONE]: I thought we already did.

6 CDC [MR. SWIFT]: I'm just going through the motions.

7 MJ [CAPT ALLRED]: You rolled over the government.

8 CDC [MR. SWIFT]: Yes, sir.

9 MJ [CAPT ALLRED]: Or they rolled over, whatever.

10 Q [MR. SWIFT]: Have you reviewed this 706 that was provided
11 Part 1 and Part 2----

12 A [DR KERAM]: Yes.

13 Q [MR. SWIFT]: That was provided to the court.

14 A [DR KERAM]: Yes, I have. May I ask that this be removed
15 because I can hear the translation it is a little distracting. Thank
16 you.

17 Q [MR. SWIFT]: Do you have the 706 with you there?

18 A [DR KERAM]: Yes.

19 Q [MR. SWIFT]: Do you agree with Colonel Ritchie's findings?

20 A [DR KERAM]: I agree with her opinion that Mr. Hamdan is
21 currently competent to stand trial. I disagree with her findings
22 regarding his diagnosis, his need for treatment and his response to
23 conditions of confinement, whether or not they would be helpful in

1 the ameliorations his relationship with his attorneys and maintaining
2 his competency.

3 Q [MR. SWIFT]: Dr. Ritchie or Colonel Ritchie diagnosed Mr.
4 Hamdan with a personality disorder. Can you explain what a
5 personality disorder is?

6 A [DR KERAM]: A personality disorder is number one, in enduring
7 pattern so that it's something that you see throughout the person's
8 lifetime. The diagnostic criteria specify that this pattern of
9 things that I'll describe is of stable, long-duration and that it can
10 be traced back at least to late adolescence or early adulthood. I'm
11 getting the "slow it down" sign again.

12 MJ [CAPT ALLRED]: Do you have a little light there in front of
13 you?

14 WIT [DR KERAM]: I don't need a light. I have a very forceful
15 right arm coming towards me. I apologize.

16 MJ [CAPT ALLRED]: And may I say to the extent that you can, I
17 think counsel would agree that simpler words, simpler explanations
18 will help.

19 A [DR KERAM]: Okay. The symptoms that we're looking for have
20 to do with thought patterns, emotional expressions, quality of
21 relationships between people and those patterns have to be disruptive
22 to normal functioning, impaired normal functioning, and also have to
23 be something that would not be expected within the person's culture,

1 all of that is listed in the DSM. They have to result in either as I
2 said impairment or distrust in the individual and you also have to
3 make sure that no other psychiatric diagnoses can better account for
4 the symptoms that you're seeing in the person.

5 Q [MR. SWIFT]: To diagnose personality disorder what is
6 normally required?

7 A [DR KERAM]: Normally the accuracy of the diagnosis heightened
8 when you have a lengthy period of time in which to evaluate the
9 person. You rarely make a diagnosis of a personality disorder after
10 the first or second visit. You are looking for a longitudinal
11 experience with the person, days, two weeks, or even months. We look
12 at past medical records, treatment records and because we're looking
13 for this enduring pattern that starts in late adolescence or early
14 adulthood we'd take careful history of whether or not they
15 successfully completed education, got a job, stayed married, all of
16 those type of things that would support good functioning. In the
17 absence of the ability to create this longitudinal experience, we
18 would recommend doing psychological testing.

19 Q [MR. SWIFT]: Did Colonel Ritchie obtain longitudinal
20 experience from or review of her 706 that you discussed?

21 A [DR KERAM]: No, she did not obtain that longitudinal view
22 even from the records that she reviewed or from the questions she
23 asked Mr. Hamdan which I reviewed with him.

1 Q [MR. SWIFT]: Did she perform any testing?

2 A [DR KERAM]: No, she did not, at least not that she reports in
3 her report.

4 Q [MR. SWIFT]: Now, did she rule out other disorders?

5 A [DR KERAM]: Let's agree on a definition of rule out. I would
6 say in order to rule out other disorders you perform a diagnostic
7 assessment or evaluation of the symptoms of that disorder in the
8 person, and she did not do that or at least it is not reflected in
9 her report. So she may say that Mr. Hamdan doesn't have symptoms of
10 post traumatic stress disorder or major depression, but she does not
11 adequately list. For example, there are a multitude of symptoms of
12 PTSD; she lists in the inquiry only five of them. There are a
13 multitude of symptoms of major depression she lists only four of
14 them. So I wasn't certain if she had even asked Mr. Hamdan about the
15 full panoply of symptoms and that is another thing that I reviewed
16 with him.

17 Typically in a competency report when we have a section on
18 diagnosis we go through all of the symptoms, all of them and indicate
19 if they are positive-present, or negative-absent, so that we can
20 indicate whether or not we can reasonably rule in or rule out the
21 diagnosis and that's not present in this report.

22

1 Q [MR. SWIFT]: In her report did she indicate that she had
2 reviewed your medical notes?

3 A [DR KERAM]: She did.

4 Q [MR. SWIFT]: What did she indicate?

5 A [DR KERAM]: In the sources of information section she just
6 wrote under "D" review of Dr. Keram's notes numbered 1 - 111, but
7 that wasn't my understanding of what happened.

8 Q [MR. SWIFT]: What was your understanding of what happened?

9 A [DR KERAM]: I xeroxed my hand-written notes and sent them to
10 defense counsel in Seattle who Bates-stamped them and sent them to
11 Colonel Ritchie. Defense counsel then received, Joe McMillian,
12 received an email from Colonel Ritchie saying that my notes were
13 illegible and could we arrange a phone call on a certain date when I
14 was working at the VA.

15 So I wrote back to Mr. McMillian and said yes and he
16 forwarded this email to Colonel Ritchie, please have her list the
17 Bates-stamps that she can't read and I'll type them to her and send
18 them on, in an email and I never heard from her after that. I am
19 left with her saying here that she has reviewed my notes, but also
20 saying that they were illegible.

21 [END OF PAGE]

1 Q [MR. SWIFT]: Did she review according to her report, medical
2 records?

3 A [DR KERAM]: Yes. She reviewed the medical records from 2000
4 - 2008 and I am not sure what medical records she has from 2000, she
5 doesn't comment on that.

6 Q [MR. SWIFT]: In review of the medical records or without
7 talking to you or consulting with you or reviewing your notes, she
8 didn't do that, would you have concern that she relied solely on the
9 medical records?

10 A [DR KERAM]: Yes, I would, in this particular case I would,
11 actually in many cases I would.

12 Q [MR. SWIFT]: Why would you have concern?

13 A [DR KERAM]: In a case like this you want to make sure that
14 you cover all your bases and interview every relevant person to make
15 sure that you have a full understanding of the context of all of your
16 different sources of information. If she had read my notes or
17 contacted me, which is what I would have recommended one of my
18 fellows do, what I would have explained to her was Mr. Hamdan's
19 distrust of the medical system and the behavioral health care portion
20 in the addition to the medical--the behavioral health care system
21 here.

22 I would have explained the reasons why that was, which I
23 could go into if you would like.

1 Q [MR. SWIFT]: Please do.

2 MJ [CAPT ALLRED]: Let me ask you, where are we going with this?
3 You withdrew your motion for the 909 and you are not challenging the
4 accused's competence to participate in the case. Why are we
5 critiquing Dr. Ritchie's report?

6 CDC [MR. SWIFT]: We are, Your Honor, because we will be
7 establishing here shortly, she has come to the conclusion that Mr.
8 Hamdan does not have PTSD. Dr. Keram will testify that he does and
9 this question of course is different of two experts on that question.

10 Dr. Keram will further testify that because of Mr. Hamdan's
11 PTSD his conditions of confinement have created a situation
12 consistent with the affidavit that she filed that would create a
13 situation called fluctuating competency that Mr. Hamdan's ability to
14 cooperate with his defense team has deteriorated, not that he is
15 incompetent for trial, but deteriorates over the period of time that
16 he is in his current conditions of confinement.

17 And that his current condition if alleviated it would
18 greater facilitate his participation in the trial and that is one of
19 the things that we are seeking is his absolute ability for Mr. Hamdan
20 to participate over a three or four week trial and how that might be
21 best done.

22 MJ [CAPT ALLRED]: Does the government concede any part of that
23 or do you want him to walk through this entire examination?

1 TC [LCDR STONE]: I think we can move past Dr. Ritchie's or the
2 critique about Dr. Ritchie's report. Dr. Ritchie's report may be put
3 into evidence it is what it is--let's hear what she has to say.

4 MJ [CAPT ALLRED]: Okay, I'm looking to pick up the pace, if she
5 has made a conclusion that he has PTSD that is probably the place to
6 start.

7 CDC [MR. SWIFT]: Certainly, Your Honor.

8 **Questions by defense counsel:**

9 Q [MR. SWIFT]: Can you describe what PTSD is?

10 A [DR KERAM]: PTSD is a psychiatric diagnosis, it is under the
11 heading of anxiety disorders and it has a number of symptom clusters
12 we call them diagnostic criteria and we letter them a - I think for
13 PTSD it is a - f. Briefly the "a" criteria requires that the person
14 be exposed to death or the perception of the threat of death either
15 themselves or somebody close to them or a serious threat to bodily
16 integrity. The "b" criteria the next cluster has to do with the
17 person re-experiencing that traumatic event in one of several ways.
18 I am just going to turn to it in the DSM findings so that I cover
19 everything.

20 The different ways are nightmares, what we call intrusive
21 symptoms, thoughts, memories, images, or flashbacks. A lot of people
22 think that intrusive symptoms are flashbacks but actually flashbacks
23 are much more rare. A true flashback is when somebody loses

1 connection with place, time and situations. It is very rare. Mr.
2 Hamdan has experienced it on a few occasions.

3 When somebody really believes and acts and perceives that
4 they are back in the place where the trauma occurred. In addition to
5 those re-experiencing symptoms in the "b" criteria, there is
6 psychological distress on exposure to reminders of the event and also
7 physiological because it is sort of an adrenaline dump so you get
8 shaky, heart beats, you might break out in a sweat that type of
9 thing.

10 Then the next cluster the "c" cluster has to do with
11 avoidance of reminders of the trauma and numbing of usual emotional
12 responsiveness and there are seven criteria under that, seven
13 different ways in which that might be represented. I won't go
14 through all of them, but it does highlight again why I disagree with
15 Dr. Ritchie's diagnosis because she didn't comment on--so it is like
16 trying to avoid things, feeling emotionally flat or numb, dead
17 inside, having a sense of a shortened future, not being able to
18 connect to other people.

19 And then the "d" criteria have to do with the biological
20 changes that occur in human brain chemistry after exposure to the
21 trauma, so it is the symptoms that occur as a result of, I am slowing
22 down, as a result of the dysregulation of brain bio-chemistry. So it
23 is things like feeling irritable, angry, short-fused, tense, on edge,

1 having outbursts of anger, trouble falling asleep or staying asleep,
2 difficulty with concentration, hyper-vigilance, you know where people
3 have 360 degree peripheral vision and exaggerated startle response,
4 where noises make you more jumpy than the other person.

5 The other criteria have to do with the symptoms needing to
6 be present for longer than a month and also again ruling out other
7 more likely causes of them. And Mr. Hamdan over the course of my
8 visits with him, every time I come to Guantanamo, I believe this is
9 my sixth or seventh visit, at each point during the time that I was
10 down here I would review all of the diagnostic criteria of PTSD and
11 also major depression because he needs that diagnosis as well. And
12 he also qualifies for that diagnosis and my observations is that his
13 behavior and the reports of his attorneys have been consistent with
14 that.

15 And I can, if you would like give you examples of things
16 that he would----

17 Q [MR. SWIFT]: Briefly a couple of highlighting some of those,
18 in other words you confirm your diagnosis and you observe and talked
19 about.

20 A [DR KERAM]: Well I think the most prominent one obviously is
21 the irritability which is the symptom that most frequently disrupts
22 the relationship that you guys have in terms of his ability to
23 cooperate with you. Mr. Mizer has described Mr. Hamdan at one point

1 being so angry with him that he put his headphones on and just sang
2 very loudly to try, maybe to try and calm himself down.

3 There have been times where he has been irritable and
4 hostile towards me, I think he has also been remorseful for that and
5 times where he has felt better.

6 There are times when his concentration is so bad, and this
7 happened yesterday with him, where I will ask him a question and he
8 will begin to answer it and lose the thread of the conversation and
9 have to have me to ask the question again and I think that the
10 insomnia is also very disruptive to his cognition.

11 You know when asking about the physiological symptoms, he
12 said some things about the hyper-vigilance. He has said he feels
13 like in terms that 360 degree peripheral vision, he says I feel like
14 I have eyes in my head and underneath my chin and on the walls. His
15 use of language is very beautiful in describing his internal
16 experience and I can give you many examples of nightmares that he has
17 had but I won't go into all them.

18 Q [MR. SWIFT]: Have you observed the exaggerated startle?

19 A [DR KERAM]: Absolutely, and you know he has consistently told
20 me that that is the way all Yemeni are, but I have observed
21 particularly on the last few visits that he is much more jumpy than
22 he was in previous years. For example yesterday he believed that
23 somebody had dropped something in the room and he almost hit the

1 ceiling and you know none of the rest of us jumped, none of the rest
2 of heard it frankly, so it is a concern. His level of autonomic
3 arousal is increasing, it may be partly the result of lack of sleep
4 that may be part of it as well. But it is also in and of itself a
5 symptom of PTSD.

6 Q [MR. SWIFT]: How does Mr. Hamdan's PTSD, you have hit on it
7 beyond irritability and concentration, how does it affect working
8 with his counsel?

9 A [DR KERAM]: I went through, if you will allow me just a
10 minute Your Honor, I went through and put very strikingly colored
11 notes on these so I could pull them out quickly. One of the things
12 that he has told me in the past is that he cannot tolerate, as all of
13 my PTSD veterans who have had a traumatic event, reliving the event,
14 which he has to do when he talks to defense counsel or to me.

15 And because that "c" criteria of avoidance of the material
16 and because of the physiological and psychological distress he
17 experiences on exposure of reminders, when we talk with him about the
18 things that he has been through, which he needs to do in order to
19 prepare, to have his attorneys understand his experience, he will
20 dissociate, he will space out, a citizens term for that, you know he
21 will start to disengage. This is not under his conscious control.
22 He will start thinking about other things. It also really affects
23 his stamina so that he can't attend for the length of time that a

1 person who didn't have PTSD could attend. He has a lot of trouble
2 with concentration and memory.

3 And these things are very embarrassing to him. One thing
4 that I have learned about their culture is the importance of
5 maintaining their face and so particularly in the beginning and still
6 now to some certain extent he won't admit when he doesn't understand
7 or when he has missed a question because he doesn't want to appear
8 stupid. And he may not remember telling me that, but that is
9 something that he said. And so he will pretend that he is with the
10 program so to speak or he will ask, he will say I didn't understand
11 the question when in reality he has drifted away.

12 I can give you lots of examples of the ways that his
13 symptoms interfere with that if you'd like me to go on.

14 Q [MR. SWIFT]: Since 2005 when you first visited with him until
15 meeting with him yesterday, you have been able to observe his
16 symptoms over a long period of time. Is Mr. Hamdan getting better or
17 worse?

18 A [DR KERAM]: He is getting worse.

19 Q [MR. SWIFT]: Why?

20 A [DR KERAM]: A number of reasons, I think the biggest reason
21 is his current conditions of confinement. Do you want me to expand
22 on each of these as I go through them?

23

1 Q [MR. SWIFT]: Yes.

2 MJ [CAPT ALLRED]: No, just tell the reasons first, can we?

3 Q [MR. SWIFT]: Well yes absolutely, what are the reasons?

4 A [DR KERAM]: Well I would certainly say the biggest reason is
5 his current conditions of confinement. The second reason is that he
6 has limited access or no access in some cases to the wide variety of
7 treatments that we would recommend for Post Traumatic Stress
8 Disorder. Let me just start with those two if that is okay.

9 In terms of the conditions of his confinement, if you look
10 at the traumas that Mr. Hamdan has experienced that were most
11 detrimental to his mental health, they are the witnessing the Arab
12 being killed in Afghanistan at Tahkt I Pol, I had trouble pronouncing
13 that. They are the length of time that he spent in Echo, solitary
14 confinement, however, you want to define that, we will come back to
15 that. And the sexual humiliation that he sustained would probably be
16 the three most traumatic--there is certainly, you know it is not a
17 contest. He has experienced a number of very severe traumas since he
18 has been taken into American custody.

19 The conditions of his confinement replicate some of those,
20 particularly his experience in Echo, which was very damaging to him.

21 [END OF PAGE]

22

1 Q [MR. SWIFT]: You said that he didn't have access to
2 treatments, what type of treatments are appropriate for PTSD?

3 A [DR KERAM]: Well I will take them in the order that a
4 psychiatrist would think of them. Number one he would think of
5 medication and Mr. Hamdan will not seek psychiatric care here and I
6 will expand on that now. He had a number of experiences with medical
7 personnel and psychiatric personnel during his custody in Guantanamo
8 that have left him with a total mistrust in the medical system.

9 The first of these was the contamination of the delivery of
10 medical care by the interrogations process. He described that to me
11 in several events and I will just give you a few of them. He told me
12 that sometime between his arrival in Guantanamo in May of 2002 and
13 September 2002 it became clear to him that the interrogators were
14 sort of the gate keepers to medical care.

15 He had back pain and was brought into an interrogation, I
16 don't know if I am allowed to say the name of the interrogator,
17 probably not, at any rate, and the interrogator said to him, you know
18 you look like you are in pain would you like me to get someone for
19 you. And he said yes that he would. And he realized then that there
20 was this connection.

21 Now I wasn't sure that, that was true, I wasn't sure that,
22 that was true and when I went--when I received the medical records,
23 actually I went back to the medical record to look to see if I could

1 find any type of external validation of what he was saying. And
2 actually in that exact time period I found a note in his medical
3 record that stated from that exact period August 20, 2002, I'm sorry
4 August 28, 2002, it says Bengay to lower back, Mr. Hamdan had a
5 history of sciatic history of back pain, Bengay to lower back then
6 cover with moleskin, special request for medical attention per FBI.
7 Then it has the FBI agent's name in the medical record and phone
8 number.

9 Q [MR. SWIFT]: Your Honor for the record that page of his Mr.
10 Hamdan's medical record has previously been provided to the court, to
11 the commission as Appellate Exhibit 199 and would ask that they also
12 considered this.

13 MJ [CAPT ALLRED]: I remember reading that exhibit.

14 A [DR KERAM]: Mr. Hamdan described other events and I will give
15 you one other one in terms of the treatment of medical care.
16 Typically when a detainee wants to go to sick call they would put in
17 a request with the guards and they might see the doctor or the
18 corpsman within one to two weeks. At one point, he developed a
19 severe flare of back pain and the corpsman never came. He was then
20 brought to the interrogation room and the interrogator told him that
21 he looked as if he were in bad pain and would he like medical
22 attention and he said yes that he would. And within a few minutes

1 corpsman came into the interrogation room and provided treatment to
2 him in the interrogation room.

3 Q [MR. SWIFT]: As a medical professional would you consider
4 someone who is familiar who works with police and correctional staff,
5 would you consider it ethical to provide treatment as part of an
6 interrogation?

7 A [DR KERAM]: Only in a life threatening situation. I later
8 received in the discovery an email from an FBI agent to FBI
9 headquarters that coincidentally is dated the same day as that note
10 that I just read to you, August 28, 2002. So this is from an FBI
11 agent here at Guantanamo, subject line reads GTMO Gazette. And he
12 writes or she writes to headquarters: We met with the medical staff
13 regarding detainees and interview process. They gave us an insight
14 into the outpatient clinic and the FLEET Hospital. They were very
15 agreeable to working directly with the interviewers and the MPs on
16 getting treatment to the detainees. We had a situation with a
17 detainee that told the interviewers that he would talk and tell them
18 whatever they needed if only they would help him get some relief for
19 his constipation, mother nature works in beautiful ways.

20 Those are just the examples that I will give you. I had
21 hoped that once his interrogation stopped that this type of
22 interference with intelligence gathering in the medical care would

1 stop but it did not. And I want to mention an incident in 2004 and
2 then the ending of the hunger strike.

3 Q [MR. SWIFT]: Is there any evidence that early in this
4 proceeding right now we are describing where the FBI can move you up
5 in the line, but not that would ultimately effect your treatment
6 maybe the timing of your treatment. Is there any evidence in Mr.
7 Hamdan's record that interrogators could actually effect the quality
8 of your treatment?

9 A [DR KERAM]: Yes, the actual delivery of treatment, yes and
10 that's the next thing that I was going to mention.

11 Q [MR. SWIFT]: What is that?

12 A [DR KERAM]: It is a note titled SMO which I believe stands
13 for Senior Medical Officer so it is written by a medical officer and
14 it is dated February 19, 2004. And Mr. Hamdan was seen by the
15 physician for complaints of pain and evaluation and exam is given and
16 he is given the diagnosis of sciatica. He is prescribed medication
17 for it. And the last thing under recommendations or plan is the
18 notation "no recreation time per intel."

19 Q [MR. SWIFT]: So at that point would it ever be appropriate
20 for an investigator to tell a doctor or medical professional what
21 type of treatment they would get?

22 A [DR KERAM]: No and it is particularly concerning. I mean
23 obviously from needing a band-aid onwards, it is particularly

1 concerning in a pain syndrome. Mr. Hamdan has sciatica; exercise is
2 a universal treatment for sciatica. So these events eroded Mr.
3 Hamdan's trust and faith that the physicians here were working in his
4 best interest.

5 I want to mention two other incidents and I won't go
6 further then that. With respect to the delivery of mental health
7 care, Mr. Hamdan was seen by the Behavioral Health Team at one point
8 and unfortunately as has been the case with all of us who have worked
9 with him, translation was a problem. He was asked if he was feeling
10 suicidal and in his dialect he said no, but in the translator dialect
11 it meant yes and so he was then relieved of his comfort items and
12 placed in a housing where he was alone, which is really sort of the
13 worst thing for him. Because that is what activates his symptoms of
14 PTSD, it causes them to flare even more than their baseline.

15 And then the final thing that I will mention today was the
16 ending of the hunger strike in January of 2006. I saw Mr. Hamdan
17 about two or three months after the hunger strike had ended. It was
18 after the appropriate length of time as per the regulations here; he
19 was brought to the hospital and force-fed.

20 [END OF PAGE]

1 Q [MR. SWIFT]: I am going to stop you there. As a psychiatrist
2 and medical professional is there anything wrong with force feeding
3 someone who is on a hunger strike?

4 A [DR KERAM]: You know that is really an institutional
5 decision. In the Federal Bureau of Prisons they will force feed
6 people who are on hunger strike, other countries approach it
7 differently. And personally I don't have an opinion about it.

8 MJ [CAPT ALLRED]: What did you say is the policy in the Federal
9 system?

10 A [DR KERAM]: They do force feed.

11 MJ [CAPT ALLRED]: They do force feed.

12 A [DR KERAM]: The last time I checked they do force feed; I
13 don't remember the date of that policy. Force feeding medically. I
14 had Mr. Hamdan walk me through the exact treatment that he got in the
15 hospital during the force feeding, okay, I had some anxiety about it
16 because I had read in the media that it was brutal and painful, but
17 actually he received treatment in a fashion that if you are going to
18 force feed somebody would be consistent with minimizing whatever
19 damage you could do. He described the naso-gastric tube, I will
20 probably use the term "NG tube," was a very small bore, the
21 circumference of it. He described like a coffee stirrer from
22 McDonalds.

1 He described the amounts of feedings, he is very, because
2 of the hyper-vigilance, he is very attentive to detail, he notes
3 everything, so he described what the bag said and how many
4 milliliters were in it and so forth and how long it took to drip.
5 And all of that was fine. I mean as a physician I had no anxiety
6 about that, so you know I was like all right we are done. So I said
7 what happened after the period of time that you were force-fed. I
8 think it was from a Monday to a Saturday.

9 I was thinking that he would have been returned to camp and
10 so did he, but what happened was once he met the criteria to be
11 discharged from force feeding, he was not taken back to his previous
12 place of custody. He was taken to Camp Oscar and a doctor and nurse
13 and came to him there and said you better eat or it is really going
14 to be bad for you. It is going to be trouble. And then guards
15 placed him in what we call a safety chair. And the only place that I
16 have ever seen these are in jail in intakes in jail when people are
17 so agitated that they need to be restrained.

18 The chair allows for full body restraint including your
19 head. He was placed into that chair, his arms and his legs were
20 strapped as well as his head was restrained and he said I will eat, I
21 will eat, and I will stop the hunger strike. And the personnel said
22 good, we will go talk to somebody about that. They went and left in

1 the chair for a few moments, came back and said too bad we are still
2 going to force feed you.

3 And they did not in that force feeding follow what a
4 physician would be, would consider to be a procedure that is designed
5 to minimize damage, pain, harm to the person. Without realizing it,
6 Mr. Hamdan described to me in the hospital, the NG tube being dipped
7 in a topical anesthetic and his nose being prepped for it so that it
8 would go down smoothly and be easy to swallow.

9 In this force feeding, he didn't know what the terms were,
10 I just listened to him describe it and he mentioned it. In this
11 force feeding there was no topical anesthetic, there was no
12 preparation of the nose. And the bore of the NG tube was too large
13 for that type of treatment. He was left strapped in the chair for a
14 period of three or four hours. He was not allowed to leave the chair
15 to relieve himself, the guards told him just to go in the chair.

16 And he was extremely humiliated by that treatment and also
17 by hearing and seeing other detainees be subjected to that treatment
18 in Oscar. And that is how the hunger strike ended. Mr. Hamdan told
19 me that he was told that a special team had been sent to GTMO, to
20 Guantanamo to break the hunger strike and that was the special team.

21 [END OF PAGE]

22

1 Q [MR. SWIFT]: As a result, does Mr. Hamdan have any trust or
2 willingness to voluntarily take medication?

3 A [DR KERAM]: I want to say one more thing about that hunger
4 strike. It was not clear to Mr. Hamdan whether or not the people who
5 administered that feeding in Oscar were medical personnel. I asked
6 him that and he said that they were not wearing the typical medical
7 personnel uniform. In fact what he said to me was that doctors,
8 butchers, I don't know.

9 To answer your question, yes, I have asked Mr. Hamdan
10 repeatedly at some point I gave up out of concern for his well-being
11 and ongoing competency, why he doesn't take medication for PTSD and
12 depression here. And he always tells me that he can't trust the
13 doctors. That he doesn't know whether or not he is still being
14 interrogated, so he doesn't want to get involved with them again.

15 Q [MR. SWIFT]: Outside of medication what can be done for his
16 PTSD?

17 A [DR KERAM]: I would estimate about 5% of my patients
18 currently won't take medication, particularly the cops that I treat
19 in my private practice, they don't want to take anything that is
20 going to effect their brains. What we recommend, the most important
21 thing because you know PTSD as I described it is a total person
22 experience. It is mind, body and soul and really with, without

1 getting too poetic, the soul symptoms are really what makes a person
2 human.

3 So being able to have meaningful interpersonal
4 relationships with people restores your faith in others in God if you
5 have lost it and in yourself. It helps reduce hopelessness, so the
6 opportunity to establish those meaningful and interpersonal
7 relationships and have those interactions is the most important
8 thing. I insist that all of my patients and particularly those who
9 don't take medication, if they can't work, do volunteer work, go to
10 church spend time with their families that type of thing.

11 The next thing would be to find something pleasurable that
12 the person enjoys and for Mr. Hamdan it is being out in the sunshine
13 and fresh air and recreating. That would be extremely meaningful to
14 him. For another person with PTSD it might be going hunting, it
15 might be poker night. But for him that is something that he
16 consistently expressed taking pleasure in. He feels dead inside. He
17 has told me that repeatedly that he has not been treated like a human
18 being here and that he has lost his feelings. And that when he is
19 treated in a humane fashion again that he has hope and faith that
20 with his humanity returned to him, his ability to feel feelings will
21 return also.

1 And that is why we encourage people to find something that
2 they enjoy doing and do it. There are lots of other things that we
3 recommend but those are the most important things.

4 Q [MR. SWIFT]: If Mr. Hamdan were returned to Camp Four would
5 it take three weeks, would we be seeing improvement in Mr. Hamdan
6 in December?

7 A [DR KERAM]: No, you would see improvement in Mr. Hamdan
8 immediately. You know it wouldn't be from here to here in an hour.
9 You would see a pretty steep curve of him getting better.

10 Q [MR. SWIFT]: Now have you reviewed a government's exhibits,
11 the government's reply, Colonel Vargo's declaration regarding Mr.
12 Hamdan?

13 A [DR KERAM]: Yes.

14 Q [MR. SWIFT]: I would like to look at a couple of things on
15 those. Colonel Vargo describes that the facilities at Camps Echo, 1,
16 3, 5, and 6 as being general population areas, which of those if any
17 have you visited?

18 A [DR KERAM]: I am sorry tell me the page number--visited I
19 haven't visited any of them.

20 Q [MR. SWIFT]: Have you visited Camp Echo?

21 A [DR KERAM]: No, I have asked to but I have not been allowed
22 to.

1 Q [MR. SWIFT]: I want to direct your attention Camp Echo, have
2 you ever visited----

3 A [DR KERAM]: Oh I'm sorry; yes I have visited Camp Echo.

4 Q [MR. SWIFT]: Have you visited any of the others?

5 A [DR KERAM]: Iguana.

6 Q [MR. SWIFT]: Have you visited Camps 1, 3, 5, and 6?

7 A [DR KERAM]: No, those are the ones that I have asked to visit
8 and I have not been allowed to.

9 Q [MR. SWIFT]: He describes Camp Echo as a single cell general
10 detention facility. Would you agree with that definition based on
11 your penal experience?

12 A [DR KERAM]: He describes it as a single cell general
13 population detention facility. They may have completely different
14 terminology here in Guantanamo, but in the correctional institutions
15 in the United States, general population and single cell with the
16 conditions of confinement here are mutually exclusive. General
17 population is what everybody else is in who is not in a camp like you
18 know, 1, 5, and 6.

19 General population are people who are not in disciplinary
20 segregation and the conditions here are very similar if not identical
21 to disciplinary segregation in many of the institutions that I have
22 worked in.

1 Q [MR. SWIFT]: Can you, what is the difference between in
2 Federal Prison terms the difference between administrative,
3 disciplinary and segregation and solitary confinement?

4 A [DR KERAM]: We would think of it in terms of things like
5 first of single cell would apply to both of them. We think of things
6 what is the actual confinement cell like, we would think of things
7 like visitation both with attorneys and family members, about what
8 types of property the person would be allowed to have. Whether or
9 not they commissary privileges and recreational time as well. And
10 from institution to institution those vary somewhat along the
11 spectrum.

12 Q [MR. SWIFT]: Has Mr. Hamdan described his current situation
13 of confinement in Camp 5 to you?

14 A [DR KERAM]: Yes he has.

15 Q [MR. SWIFT]: Based on his description how would you
16 characterize it?

17 A [DR KERAM]: It has aspects of solitary confinement and
18 aspects of administrative or disciplinary segregation, but it is not
19 general population.

20 MJ [CAPT ALLRED]: You said part voluntary confinement?

21 A [DR KERAM]: It has aspects of solitary confinement.

22 MJ [CAPT ALLRED]: Oh solitary confinement, I am sorry.

23

1 Q [MR. SWIFT]: How would you describe Camp Echo?

2 A [DR KERAM]: Camp Echo would be almost identical to solitary
3 confinement. I can think of very little differences. That is pretty
4 much solitary confinement. He did not have a window. He could not
5 see the outside in Echo. He had an opaque, frosted piece of
6 Plexiglas in the room next to the cell that he was in and that was
7 the only access to natural light that he had. In the beginning there
8 was no recreation cage there. When there was first a recreation cage
9 there he had very limited access to it, not every day. And he always
10 recreated alone. And those are not administrative segregation
11 conditions; those are more towards the solitary.

12 Q [MR. SWIFT]: In your experience, do pretrial individuals who
13 are in pretrial with the federal system or are in pretrial
14 confinement, are they ever placed in solitary confinement?

15 A [DR KERAM]: They are never placed in solitary confinement.
16 They may be placed in disciplinary segregation or administrative
17 segregation for their own safety if they are charged with something
18 like child rape or if they are a police officer. Something that
19 would make them the target of other people in the institution, but
20 for pretrial detention most people are in general population with far
21 more privileges than the people do here outside of Camp 4.

22 One thing and I don't know if you are aware of Mr. Swift is
23 that many federal pretrial detainees are held in local jails.

1 Q [MR. SWIFT]: Actually, yes, and they would be held in general
2 population there. Is that true for individuals who are accused of
3 murder?

4 A [DR KERAM]: Absolutely. It would depend you're classified in
5 most institutions. You are not classified based on what you are
6 charged with you are classified based on your ability to be safe in
7 the institution. It is the institutional safety concerns, yourself,
8 the other detainees and the defendants and the staff that would
9 determine your level of housing.

10 Q [MR. SWIFT]: Have you reviewed Mr. Hamdan's disciplinary
11 record?

12 A [DR KERAM]: Yes, I have.

13 Q [MR. SWIFT]: In reviewing his disciplinary record would you
14 characterize him as violent?

15 A [DR KERAM]: No.

16 Q [MR. SWIFT]: Why do you say that?

17 A [DR KERAM]: Because he has not engaged in behavior that is
18 predictive of violence, inmate on inmate violence or inmate on staff
19 violence. He has never been found with a shank as contraband or
20 trying to make shank. He has never hoarded material that could be
21 made into a shank. In fact a number of the visits that I have seen
22 him, because he doesn't want the guards to be unfairly blamed for

1 things, if one of them forgets to take back a fork or a pen, he will
2 say hey you need to take this you don't want to get in trouble.

3 So there is no evidence of desire to harm and then when you
4 look at actual behavior, he has never physically assaulted another
5 detainee or a guard with the exception of throwing urine on one
6 occasion since he has been here.

7 Q [MR. SWIFT]: Is throwing urine a serious offense?

8 A [DR KERAM]: I would say that it is a moderate offense; it is
9 certainly, you know you would have to have a lot of respect for the
10 correctional officers who are working with this person every single
11 day and throwing urine should be disciplined. It should be written
12 up as a disciplinary action and it should be punished. But the
13 punishment would not exceed, you know certainly somebody would be
14 placed in administrative segregation, disciplinary segregation for
15 depending on the institution maybe two weeks to a month, something
16 like that.

17 Q [MR. SWIFT]: What did Mr. Hamdan receive for throwing the
18 urine?

19 A [DR KERAM]: I think his housing was changed for, I don't even
20 recall if he has been out of his housing, what I would consider to be
21 disciplinary segregation since that happened, what year was that, was
22 that 2006 or 2007, I don't even remember.

1 Q [MR. SWIFT]: Colonel Vargo in his affidavit indicates in
2 particular that Mr. Hamdan on 20 September 2007, one of the principle
3 reasons he cites, not returning Mr. Hamdan to Camp Four, is that he
4 participated in an a riot on Camp--on 20 September 2007. Have you
5 reviewed Mr. Hamdan's correctional records to that day?

6 A [DR KERAM]: And this is why it is so important to do this,
7 when I first saw this filing I thought, he is really, he is really
8 engaged in some very bad behavior here. It said he has, this is page
9 7. He has been cited for assault and threat of assault within the
10 past year and inciting a mass disturbance as recently as 20 September
11 2007. So I finally got the DIMS record just a couple of days ago and
12 went to 20 September thinking that there was a mass riot.

13 What happened was in the cells there is a line inside the
14 cell painted on the floor. And the detainees need to stand back from
15 it when something is coming through what is called a bean hole down
16 here; we just always call it a food slot. And Mr. Hamdan as he often
17 does needs to be told twice to do something as many people in custody
18 do and he didn't step back from the line.

19 And he was told again to do it, and he started shouting and
20 banging on his door. Three other detainees also started banging on
21 their door. They were told twice to stop it and after the second
22 time they stopped it. And Mr. Hamdan stepped back from the line and
23 that is the mass disturbance.

1 Q [MR. SWIFT]: In a federal facility if you had seen that,
2 would you characterize it as a major offense?

3 A [DR KERAM]: If I had seen that, that would be an every day
4 24/7 occurrence on many of the facilities that I work in. I mean it
5 is loud, people are always banging they are always shouting in many
6 of the facilities that I have been in and experienced correctional
7 guards will strike a balance between the detainees letting off steam
8 or maybe noting minor infractions in the record and focusing the
9 punishment on conduct that could result in a major disruption of the
10 institution or a threat to the safety to the institution.

11 Q [MR. SWIFT]: Does Mr. Hamdan's PTSD make him more likely that
12 he will commit these kind of minor offenses?

13 A [DR KERAM]: Yes, yes and I don't remember, he is very
14 irritable and one of the diagnostic symptoms is outbursts of anger
15 and I don't remember if in the morning, if Mr. Hamdan testified about
16 the sign that we had him make that said don't get angry.

17 Q [MR. SWIFT]: Yes, he did.

18 A [DR KERAM]: You know there are just times for him where his
19 level of anger or irritability like a lot of people with PTSD causes
20 him have outbursts that are not in his self-interest and in fact,
21 what you want to do is to decrease the factors that exacerbate the
22 likelihood that that will happen. And increase the factors that will

1 decrease the likelihood that that will happen. The conditions of his
2 housing right now are sort of like gas on the flame.

3 Q [MR. SWIFT]: So would you agree that if Mr. Hamdan were moved
4 from Camp Four he would more than likely he would actually experience
5 fewer incidences of disciplinary infractions?

6 A [DR KERAM]: I would expect that. You know being realistic I
7 think that he would still engage in very mild instances, like when he
8 touched the fence when they told him not to touch the fence. It
9 wasn't a security issue at all, but I think that the severity, by
10 severity I mean things like name calling and those are most of the
11 disciplinary infractions are things like name calling and banging. I
12 think that they would go down dramatically if not disappear all
13 together.

14 So would the level of irritability that disrupts your
15 relationship with him and also I think that he would sleep better,
16 which would help his concentration and memory. I witnessed him
17 yesterday getting sort of lost in the legal concepts, which is very
18 concerning given where he is in his trial preparation.

19 Q [MR. SWIFT]: Turning to a different subject, during your
20 review of his medical records and your interviews of Mr. Hamdan did
21 you see any evidence concerning where Mr. Hamdan has been subject to
22 psychological coercion?

23 A [DR KERAM]: Yes.

1 Q [MR. SWIFT]: In particular, what did you see?

2 A [DR KERAM]: There were four areas that would make him
3 suggestible. One was the removal of his comfort items, the next
4 would be the sexual humiliation that he experienced, and the other
5 would be the interference and his access to medical care particularly
6 because he has a pain syndrome. I am not recounting the fourth right
7 now but it will come back to me.

8 Q [MR. SWIFT]: Did you see any evidence of sleep deprivation?

9 A [DR KERAM]: Of course, it was yes, I did, which was we just
10 discovered, which is why I probably did not remember it, we just
11 discovered that evidence a couple of days.

12 One thing that I have learned about Mr. Hamdan is that you
13 need to answer--you need to ask the question in a very specific way
14 because he is very concrete in certain ways. So I had asked him
15 previously about sleep deprivation and he didn't recall it. And then
16 you asked him the question, I believe on Sunday and he did. And at
17 the same time you were out there visiting him and getting that
18 history, we had found the note about Operation Sandman so in my notes
19 it will reflect he told me that he was not subject but I haven't
20 asked the question the right way.

21 Q [MR. SWIFT]: How do you mean by ask it the right way?

22 A [DR KERAM]: He is really particular, you know, if you say it
23 happened here and it happened here sort of as an offhand remark.

1 When you were being interrogated, were you subject to sleep
2 deprivation. Well if it happened while he was walking, not where he
3 was usually housed but a different housing, he would say no. So you
4 have to ask the question the right way in order to illicit the
5 truthful response.

6 And we know it would have been a truthful response because
7 now we have the records saying that he was in Operation Sandman.

8 Q [MR. SWIFT]: Now is that consistent with PTSD in his
9 avoidance behavior?

10 A [DR KERAM]: Absolutely. Frequently when I would meet with
11 him the first day, the second day he would be very shaken up because
12 we would have covered material that would have exposed him to
13 traumatic material and so Operation Sandman would be another thing.

14 Well here is the other thing Mr. Swift. When you are sleep
15 deprived it impairs lying down of memory. It impairs two things of
16 memory, one is accurate recall and the other is creation of new
17 memory during that period of time when you are sleep deprived, which
18 is why you should never stay up late and cram.

19 So it may be that this sleep deprivation occurred and he
20 wasn't remembering it until you asked a question that would illicit
21 it.

22

1 Q [MR. SWIFT]: Let's go through each one of these areas comfort
2 areas, did you find some documentation of the comfort items?

3 A [DR KERAM]: Yes.

4 Q [MR. SWIFT]: What did you find?

5 A [DR KERAM]: I found that they were taken away from him
6 without any explanation in the DIMS record as to why. There was no
7 indication that it was done because of any type of punitive action.

8 Q [MR. SWIFT]: Was there a record that they were later returned
9 to him?

10 A [DR KERAM]: Yes and again without indicating why.

11 Q [MR. SWIFT]: Did Mr. Hamdan tell you about that experience?

12 A [DR KERAM]: Yes. He had told that before I saw it verified
13 in the DIMS record. He had told--I had asked him if there was any
14 way that he could tell that an interrogation was about to happen and
15 one of things that he told me was that typically before an
16 interrogation his comfort items would be removed from his cell,
17 placed in a box and the box placed on top of his cell. And this was
18 a day or two perhaps three before so that his level of anxiety would
19 start to rev up as he would stare at the box.

20 One thing I think that people who have not been in custody
21 may have the difficulty of understanding is the intensity of the
22 attachment of people in custody to their comfort items. It
23 represents all of their belongings, all that they control and they

1 have a very strong emotional attachment to them. And not being able
2 to access them particularly for things like the Quran or pictures or
3 things that truly involve physical comfort it is very distressing to
4 them, more so then it would be, you know if you didn't get to sleep
5 on your favorite pillow that night, that type of thing. That
6 increased his anxiety.

7 Q [MR. SWIFT]: What about the medical treatment? What would
8 that do to his psychological?

9 A [DR KERAM]: It made him completely dependent on the
10 interrogators. He came to view them as the gateway to medical
11 treatment. One thing that I didn't mention was that sometimes when
12 he would put in for sick call and be brought to the infirmary so no
13 involvement of the interrogators. The interrogator would be there in
14 the exam room in the infirmary. So there was sort of no escape for
15 him.

16 He has sought medical care when he has pain, but I think
17 for many more minor things he will avoid them if he can.

18 Q [MR. SWIFT]: But because of the sciatica injury.

19 A [DR KERAM]: He has to.

20 Q [MR. SWIFT]: He has to seek medical attention at some point.

21 A [DR KERAM]: And he has had some dental pain as well.

22

23

1 Q [MR. SWIFT]: How did the sexual contact affect Mr. Hamdan?

2 A [DR KERAM]: One thing let me just back up and explain this
3 concept of being vulnerable to suggestion or suggestibility. We know
4 that there are a number of factors that make people much more prone
5 to that type of coercive experience. One of them is their level of
6 anxiety. So anything that is going to increase a level of anxiety,
7 especially when it involves a threat that they may be able to stop,
8 it will break through their will.

9 And for Mr. Hamdan, one thing again I have learned about
10 the Arab culture through consulting with the psychologist who I spoke
11 with is that there are very few things that will make him more
12 anxious than sexual contact. And for him that was sexual contact--
13 let me just make that clear--between him and another female who is
14 not his wife. That is about a 10 that is about an 11 on a scale of 1
15 to 10. And to make that stop he would do anything.

16 [END OF PAGE]

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1 Q [MR. SWIFT]: Finally, let's talk. Well, I want to clear
2 something up then. During these cross-examinations, Lieutenant
3 Commander Stone indicated that your notes indicate that that occurred
4 some six months after the FBI interview in 2003, really roughly about
5 the time that I was assigned to Mr. Hamdan in December 2003, so about
6 the time that I was assigned to him was when that was happening. Is
7 that what your notes actually indicate?

8 A [DR KERAM]: No, they indicate that it happened approximately
9 six months before. I have an "A" there with a line over it. Now
10 physicians use the same ante and post like am and pm, so "A" with a
11 line over it means before. "P" with a line over it means post,
12 afterwards. If you--I can pull this up in just a second, but I will
13 show you that my notes say "A" afterwards, I'm sorry, "A" before the
14 interview.

15 Q [MR. SWIFT]: So what Mr. Hamdan told you was that this had
16 occurred some six months before?

17 A [DR KERAM]: Right approximately six months before.

18 MJ [CAPT ALLRED]: There is no need to find it.

19 CDC [MR. SWIFT]: What is that?

20 MJ [CAPT ALLRED]: There is no need to find it I will take your
21 word for that.

22 A [DR KERAM]: There were some other mistakes that----

23

1 Q [MR. SWIFT]: What were those by the way?

2 A [DR KERAM]: Just briefly, Commander Stone, is that your last
3 name? I want to tell you what my notes reflected that you got wrong,
4 Mr. Hamdan told me that he saw----

5 MJ [CAPT ALLRED]: No, you ask the question, I don't want her
6 reading from her notes.

7 A [DR KERAM]: I am not reading from my notes.

8 MJ [CAPT ALLRED]: You ask the questions.

9 Q [MR. SWIFT]: With regards to Lieutenant Commander Stone's
10 questioning about Mr. Hamdan being confined in Bagram in a cell and
11 his witnessing violence, what did your notes reflect?

12 A [DR KERAM]: Mr. Hamdan never told me that he was kept in
13 isolation the entire time that he was in Bagram. He had told me that
14 he was in isolation for two weeks. With respect to seeing other
15 detainees being beaten, he told me that had occurred at Kandahar. I
16 also wanted to correct one other thing.

17 MJ [CAPT ALLRED]: No, no.

18 A [DR KERAM]: I'm sorry.

19 Q [MR. SWIFT]: To my questions, I would like to go to sleep
20 deprivation. Can you explain what happens to someone when sleep
21 deprivation occurs? The psychological?

22 A [DR KERAM]: The medical consequences or the psychiatric
23 consequences or both?

1 Q [MR. SWIFT]: Both.

2 A [DR KERAM]: With respect to the medical consequences of sleep
3 deprivation, people experience the release of inflammatory proteins,
4 which increases the risk for dysregulation of their glucose
5 metabolism, which is a risk of developing diabetes. They also
6 release higher levels of something called C-reactive protein, which
7 we now use as a screening test for cardiac disease risk. So it puts
8 them at risk for heart attack and other inflammatory processes like
9 arthritis and some other ones. So there is a definite medical
10 consequence in addition to the psychological consequences to sleep
11 deprivation.

12 Q [MR. SWIFT]: What are the psychological consequences?

13 A [DR KERAM]: The psychological consequences of sleep
14 deprivation, I will first address memory. As I said earlier, people
15 who are sleep deprived have trouble retrieving memory correctly and
16 also laying down memory correctly. And what the literature shows is
17 that if you are sleep deprived somebody before you interrogate them
18 that if you as the interrogator bring material to their attention
19 that is not true, they will believe it and the interesting thing is
20 that the certainty at which they are convinced it is true is higher
21 than it is for people who recall things that they actually went
22 through.

1 So it makes, sleep deprivation makes the person more
2 vulnerable to giving information that they gain from the interviewer
3 that is not true. In addition to being unable to access their own
4 memory correctly, people with sleep deprivation, they have emotional
5 dysregulation. And what that means is that the emotions can bounce
6 all over the place, so that they can at times appear numb and flat.
7 At times appears manic or giddy or euphoric, at times become
8 irritable and short fused, tearful, sad, depressed, so you have that
9 total emotional dysregulation.

10 And then people also have lapses of attention because you
11 get these bursts of what are called micro-sleeps. They can only last
12 a few seconds at times, but the brain wave pattern goes into sleep,
13 even just momentarily. So they may be sort of phasing in and out
14 that is commonly, you know, when people run off the road and that
15 type of thing because they are not connected to their consciousness
16 for a brief period of time.

17 **[END OF PAGE]**

1 Q [MR. SWIFT]: Mr. Hamdan described being woken up
2 consistently, intervening patterns throughout the evening, he didn't
3 have a watch, wasn't able, but he said sometimes 15 minutes sometimes
4 an hour et cetera. Would the fact that you got say thirty minutes
5 sleep and then he gets woken up and then he gets 45 minutes sleep, so
6 maybe over the entire time maybe he gets four hours of sleep. Has he
7 gotten four hours of sleep?

8 A [DR KERAM]: No, in fact that has been looked at, we call that
9 fragmented sleep and sleep--fragmented sleep and total sleep
10 deprivation produce the same mental state effects.

11 Q [MR. SWIFT]: Now when Mr. Hamdan, you talked about cramming
12 for an exam, we will call them memories, would Mr. Hamdan necessarily
13 have accurate memories of the period of time that he suffered sleep
14 deprivation?

15 A [DR KERAM]: No, one wouldn't expect that he would lay down
16 memory during that time in the normal fashion. It would be totally
17 disruptive. So if you are asking him about what happened during that
18 period of time he may not remember accurately or at all.

19 **[END OF PAGE]**

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1 Q [MR. SWIFT]: Now would you be able to implant a suggestion in
2 Mr. Hamdan say to justify the prosecution here that he swore bayat
3 and then because it was implanted during a time of sleep deprivation,
4 later when he had sleep and was more his normal self, would he then
5 believe that he had sworn bayat?

6 A [DR KERAM]: He could or he couldn't. Different people would
7 have a different experience of that. He may or he may not, if I
8 understand your question correctly.

9 Q [MR. SWIFT]: I guess my question is can you create a false
10 memory during sleep deprivation that lasts beyond sleep deprivation?

11 A [DR KERAM]: You can certainly.

12 Q [MR. SWIFT]: Do you necessarily create such a memory?

13 A [DR KERAM]: No.

14 Q [MR. SWIFT]: Has sleep deprivation been considered as an
15 interrogation technique by psychological associations?

16 A [DR KERAM]: No, in fact in the ethical guidelines of the
17 American Psychological Association, psychologists are prohibited from
18 involvement in interrogations involving sleep deprivation. In the
19 American Medical Association and the American Psychiatric Association
20 the physicians are precluded from being involved in interrogations
21 involving torture and torture includes sleep deprivation under the
22 definitions that they are referencing.

1 Q [MR. SWIFT]: To be clear, the American Psychiatric
2 Association and the American Medical Association has listed sleep
3 deprivation as torture.

4 A [DR KERAM]: Again, let me clarify. They will not allow
5 physician participation those two organizations in interrogations
6 involving torture. Now they rely on definitions of torture that were
7 established by other bodies and those bodies cite sleep deprivation
8 as one of those techniques. The American Psychological Association
9 specifically cites sleep deprivation as a technique in which it is
10 involved in interrogation and psychologists may not participate.

11 Q [MR. SWIFT]: As a whole looking at Mr. Hamdan's interrogation
12 did it have in the field of psychiatry a parallel or, let me rephrase
13 that.

14 A [DR KERAM]: If you ask me what it reminds me of what I have
15 seen in psychiatry.

16 Q [MR. SWIFT]: Yes.

17 A [DR KERAM]: I would say number one it reminds me of
18 interrogation techniques used at the Hanoi Hilton, for example,
19 things that POW patients of mine have been subjected to. It is also
20 as a psychiatrist what comes to mind next is all of the changes and
21 the laws that have come about since the Libby Zion case, which took
22 place in New York.

1 Where a very young woman, it is a very sad story, was
2 brought to a hospital with belly pain and turned out to have I
3 believe appendicitis. I am not sure of that. And was seen by
4 somebody who had been on call, a young physician, who had been kept
5 up for about I think 36 hours at that point. At any rate the young
6 woman ended up dying and it was related to the sleep deprivation of
7 this physician. Her parents sued successfully and the end resulted
8 in changes of law throughout the United States about how much sleep
9 deprivation physicians could be subjected to because of the
10 disruptions in memory, cognition, awareness, consciousness.

11 I mean I will tell you not just with sleep deprivation but
12 all of this behavior that Mr. Hamdan was subjected to in conjunction
13 with his interrogations, the thing that it most reminds me of is the
14 what we call operative conditioning, you know the Skinner Behavioral
15 Theories. Where what you try to do is shape behavior by either using
16 positive or negative reinforcement, and this is a perfect--the
17 interrogation system here is a perfect example of identifying the
18 behavior you want and then deploying a system of positive and
19 negative reinforcement in order to get that behavior.

20 It is not just the sleep deprivation, it is the sexual
21 humiliation, it is removing the comfort items, it is the access to
22 medical care and a number of other things that Mr. Hamdan described
23 to me, which we didn't go into.

1 CDC [MR. SWIFT]: I have no further questions at this time, Your
2 Honor.

3 MJ [CAPT ALLRED]: It looks like you and the whole team are
4 exhausted to me.

5 CDC [MR. SWIFT]: It is 1700 sir. I told you we would make it.

6 MJ [CAPT ALLRED]: Very good, well done. Well I think it might
7 be a good time to recess for the evening.

8 DC [LCDR MIZER]: Sir, just really quickly, we have I believe
9 set up one final witness for purposes of the coercion motion. They
10 would testify via VTC tomorrow morning. I think we are trying to
11 make sure that that will happen. It is Colonel Morgan Banks and the
12 entire examination would last probably about five or six questions,
13 very brief, Your Honor.

14 MJ [CAPT ALLRED]: What are you telling me? Do we need to start
15 earlier than nine?

16 DC [LCDR MIZER]: No, Your Honor, I'm just letting you know, I
17 believe it is at 9 Your Honor, but LN1 Lindee is upstairs trying to
18 figure that out right now.

19 TC [LCDR STONE]: Sir, if it is at 9 o'clock they can ask their
20 five questions and we will pick up with ours right afterwards.

21 MJ [CAPT ALLRED]: Sounds like a plan.

22 DC [LCDR MIZER]: Yes, sir.

1 MJ [CAPT ALLRED]: We will recess then until 9 o'clock in the
2 morning. Thank you Dr. Keram for your testimony, you will return to
3 the witness stand tomorrow at 9. We will give the trial counsel a
4 chance to ask their questions.

5 **[The R.M.C. 803 session recessed at 1710, 15 July 2008.]**

6 **[END OF PAGE]**

1 **[The R.M.C. 803 session was called to order at 0907, 16 July 2008.]**

2 MJ [CAPT ALLRED]: The court is called to order.

3 You also look fine in the suit. But I've come to expect it
4 from you.

5 CTC [MR. MURPHY]: Your Honor is referring to wearing a tie at
6 10:00 or 11:00 at night. Is that right?

7 MJ [CAPT ALLRED]: Where are we this morning? I understand that
8 there was a VTC witness scheduled?

9 CTC [MR. MURPHY]: Yes, Your Honor. The defense has cancelled
10 that witness due to a change in that witness' testimony that occurred
11 after reviewing his notes last night. He will still be called on the
12 merits in this case, but not for this motion.

13 MJ [CAPT ALLRED]: Fair enough. In that case, I think, does the
14 government waive cross-examination?

15 CTC [MR. MURPHY]: No. We do have cross-examination, Your
16 Honor.

17 MJ [CAPT ALLRED]: Why don't we call Dr. Keram back to the
18 stand, then, and we will continue her examination?

19 **[Dr. Keram was re-called to the witness stand and continued with the**
20 **examination.]**

21 **[END OF PAGE]**

1 **CROSS-EXAMINATION**

2 **Question by the trial counsel:**

3 Q [MR. MURPHY]: Good morning, Dr. Keram, I'm John Murphy. You
4 and I have met in the past and down here. Is that right?

5 A [DR. KERAM]: Yes.

6 Q [MR. MURPHY]: I want to talk to you a little bit about your
7 clinical findings that you testified about yesterday, and I've
8 identified four major findings.

9 First, that the accused is competent to proceed to trial.
10 Is that correct?

11 A [DR. KERAM]: At the present time, Mr. Hamdan is competent, in
12 my opinion.

13 Q [MR. MURPHY]: Secondly, that he is currently able to assist
14 in his own defense. Correct?

15 A [DR. KERAM]: He has moments when he is not. But for the
16 majority of the time and for the, what I would say is the
17 overall--his overall ability allows him to be competent, to cooperate
18 with his attorneys, yes.

19 Q [MR. MURPHY]: Three that he suffers from PTSD, which would
20 likely be medically addressed if he chose to take prescription
21 medicine?

22 A [DR. KERAM]: Can you tell me what you mean by addressed?

1 Q [MR. MURPHY]: Well, could be alleviated, could be improved.

2 A [DR. KERAM]: As I mentioned yesterday, there are a number of
3 things that would improve his symptoms. Medication is one of them.

4 Q [MR. MURPHY]: And, finally, you have concerns that his
5 condition may worsen?

6 A [DR. KERAM]: Yes.

7 Q [MR. MURPHY]: All right. Now, I would like to turn first the
8 to the interrogation issue that you testified at some length on
9 yesterday.

10 You stated that you were very concerned that the
11 interrogators were allegedly controlling, and I believe these are
12 your words, both the quality and quantity of medical care provided to
13 these detainees. Is that right?

14 A [DR. KERAM]: I don't recall my exact testimony. But I will
15 take your word for it.

16 Q [MR. MURPHY]: All right. Is that an accurate statement?

17 A [DR. KERAM]: It's an accurate reflection of my view. Yes.

18 Q [MR. MURPHY]: You were concerned that medical care is being
19 provided based on the success or lack of success as determined by the
20 therapy.

21 A [DR. KERAM]: I'm----

1 Q [MR. MURPHY]: Is that right?

2 A [DR. KERAM]: I'm concerned about two things. One is Mr.
3 Hamdan's perceptions based on what he experienced with the
4 relationship between interrogators and medical care led him to
5 believe to the point of knowledge, certainly that that was the case
6 for him. And the other is that the record supports that view. So I
7 share that concern as well.

8 Q [MR. MURPHY]: But you stated quite plainly that you said that
9 the interrogators were gatekeepers to medical care. Is that correct?

10 A [DR. KERAM]: Yes. At times--when Mr. Hamdan was being
11 interrogated, that there were times where he needed medical care
12 where they were the gatekeepers.

13 Q [MR. MURPHY]: And you also testified that he was not
14 medically--it's not ethical to have medical care provided as part of
15 an interrogation plan. Correct?

16 A [DR. KERAM]: I was--what I testified was that
17 interrogators--medical personnel should not participate in
18 interrogations.

19 Q [MR. MURPHY]: You're saying these interrogators were serving
20 as gatekeepers to medical care. That was quite plain in your
21 testimony. Wasn't it?

22 A [DR. KERAM]: That's what I meant to convey. Yes.

1 Q [MR. MURPHY]: What would be your reaction if I told you that
2 all of the FBI interrogators and other federal law enforcement agents
3 prepared to testify right after you, and all took statements from Mr.
4 Hamdan saying that your claim is completely false?

5 A [DR. KERAM]: That wouldn't surprise me.

6 Q [MR. MURPHY]: Why is that?

7 A [DR. KERAM]: I don't know what they would base that upon.
8 And I wouldn't presume to know what they would base that on. But it
9 wouldn't surprise me that they would have a different opinion.

10 Q [MR. MURPHY]: Well, in making this serious allegation that
11 they are gatekeepers of medical care against the FBI agents and other
12 federal officers agents, did you personally speak with any FBI agent
13 or federal interrogator about the interrogation process?

14 A [DR. KERAM]: No.

15 Q [MR. MURPHY]: Did you ask to speak with any FBI interrogator
16 about this process?

17 A [DR. KERAM]: I believe that I told the defense team that that
18 would be helpful for me to do. I don't know what they did with that
19 request.

20 Q [MR. MURPHY]: You haven't spoken with me or Commander Stone
21 about it. Have you?

22 A [DR. KERAM]: No.

23

1 DC [LCDR MIZER]: Your Honor, I would object to this line of
2 questioning. We asked for access to these witnesses and were told
3 that we would not be able to speak with these witnesses. Only one
4 FBI agent agreed to speak with us, for the record.

5 MJ [CAPT ALLRED]: Well, that's a most unusual objection.

6 DC [LCDR MIZER]: Then it's withdrawn, Your Honor.

7 MJ [CAPT ALLRED]: Oh. I'll allow this line of questioning. I
8 understand what you're saying. There may have been some logistical
9 or communication problems. But her testimony was that she didn't
10 speak to the agents, and that impeaches to a certain extent her
11 conclusion, I guess.

12 Please go ahead.

13 Q [MR. MURPHY]: Do you know the names of a single FBI
14 interrogator in this case?

15 A [DR. KERAM]: Yes, I do.

16 **[END OF PAGE]**

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1 Q [MR. MURPHY]: I'm going to read you the names that are
2 involved in this case. FBI Special [REDACTED], FBI Special Agent
3 [REDACTED]. There's also some NCIS agents. They include NCIS
4 Agent [REDACTED], FBI Agent [REDACTED], FBI Agent [REDACTED]
5 [REDACTED], [REDACTED] who is a retired service member. FBI
6 Special Agent [REDACTED], and NCIS Agent [REDACTED].

7 Are you personally accusing them of leveraging medical care
8 for interrogation success?

9 A [DR. KERAM]: I don't know the specific names, other than the
10 name that is written in the medical record that I read yesterday
11 where there's an FBI agent's name written--and phone number written
12 in the medical record saying that he is requesting medical attention
13 for Mr. Hamdan during the period of his interrogation, at the same
14 time that Mr. Hamdan had requested medical care to the interrogators.

15 Q [MR. MURPHY]: So as to those agents I just read, what is your
16 answer to whether you are personally accusing them?

17 A [DR. KERAM]: Those names--first of all, the names that Mr.
18 Hamdan gave me, I don't know whether or not they are the real names
19 of the interrogators. But those names do not appear in his medical
20 record and were not mentioned in conjunction with direct access to
21 medical care, as far as I recall. I'd have to check my notes.

22

23

1 Q [MR. MURPHY]: Would you be open to changing your view on FBI
2 and interrogators if you listened to their testimony here at this
3 trial?

4 A [DR. KERAM]: Certainly.

5 Q [MR. MURPHY]: Are you aware that FBI Special Agent [REDACTED]
6 [REDACTED] and NCIS Special Agent [REDACTED] were stopped by Mr. Hamdan
7 during an interview, and he stated that he would no longer continue
8 to speak with them?

9 A [DR. KERAM]: I didn't know the names of the agents.

10 Q [MR. MURPHY]: Did you know that there were agents that were
11 stopped by Mr. Hamdan?

12 A [DR. KERAM]: Yes.

13 Q [MR. MURPHY]: He is capable of stopping an interrogation when
14 he wants to. Right?

15 A [DR. KERAM]: From what Mr. Hamdan told me, there were times
16 where he wanted to stop and did not speak--did not want to continue,
17 but was afraid of what would happen if he did not. So he didn't
18 always express the desire to stop because he was afraid of
19 punishment, particularly the sexual degradation and humiliation that
20 he experienced. Once that happened to him, he continued to fear and
21 have nightmares that that would happen again for--I believe he told
22 me for months afterwards.

23

1 Q [MR. MURPHY]: Doctor, in response to my question, he can
2 stop. He's capable of doing that. Correct?

3 A [DR. KERAM]: I don't know. I don't know the answer to that.
4 I did not ask him specifically if there were times when he asked to
5 stop an interview and then continued. That may have occurred during
6 the sleep deprivation time. I don't recall.

7 Q [MR. MURPHY]: Doctor, has Mr. Hamdan shown to you episodes of
8 manipulation?

9 A [DR. KERAM]: Yes.

10 Q [MR. MURPHY]: Please explain what you saw regarding
11 manipulation.

12 A [DR. KERAM]: There were times when we were discussing
13 material that was painful for him and retraumatized him because he
14 had to explain the things that happened to him that were painful,
15 where he would say--you know, we would start in the morning and he
16 would say to me, "You've got until 2:00 and that's it." And once we
17 got into actually speaking, we would go after 2:00. But then if I
18 asked him a question that he didn't want to answer, usually regarding
19 something in the A criteria of PTSD that was retraumatizing, he would
20 say, "Look, you know, you're over your time. I gave you an extra
21 hour or half hour, and you need to ask a different question or you
22 need to leave." That type of thing.

23

1 Q [MR. MURPHY]: All right. So he's shown manipulation even to
2 you?

3 A [DR. KERAM]: Correct.

4 Q [MR. MURPHY]: Did you note in Dr. Ritchie's report, the
5 government's psychiatrist, that she also found manipulation? Did you
6 note that?

7 A [DR. KERAM]: Yes.

8 Q [MR. MURPHY]: In fact, she said, and I will quote one
9 sentence from her. "He is described in a number of notes as
10 manipulating and wanting to use behavioral health system to switch
11 camps." Did you note that finding by Dr. Ritchie?

12 A [DR. KERAM]: Yes.

13 Q [MR. MURPHY]: That's consistent with your findings of
14 manipulation. Isn't it?

15 A [DR. KERAM]: Well, you know, different people can observe the
16 same phenomena and arrive at a different conclusion. I think,
17 because I had very early on expressed my concern to Mr. Hamdan that
18 the conditions of confinement were problematic for his mental health,
19 that--and I had asked his permission to write to the SJA about that,
20 that he connected the severity of his symptoms to the possibility
21 that behavioral health people could be involved in ameliorating that.

22

23

1 Q [MR. MURPHY]: All right. Doctor, are you familiar with a
2 document that is referenced by investigators in terrorism known as
3 the Manchester Manual?

4 A [DR. KERAM]: Yes. Well, I haven't read it.

5 Q [MR. MURPHY]: You're aware of it?

6 A [DR. KERAM]: I'm aware of it. Yes.

7 Q [MR. MURPHY]: You're aware that it instructs al Qaeda members
8 to manipulate the criminal justice process by making false claims of
9 torture? You're aware of that?

10 A [DR. KERAM]: I understand that that's what it says. Yes. I
11 haven't read it directly myself.

12 Q [MR. MURPHY]: All right. Let's turn to the issue of your
13 testimony that was fairly extensive on PTSD.

14 You've medically determined that Mr. Hamdan suffers from PTSD.
15 Is that correct?

16 A [DR. KERAM]: Yes.

17 Q [MR. MURPHY]: But you would also agree, medically, that if
18 you have PTSD, you can be, one, competent to proceed to trial; and,
19 two, assist in your own defense?

20 A [DR. KERAM]: Absolutely.

21 [END OF PAGE]

1 Q [MR. MURPHY]: Correct? And that is currently the state of
2 Mr. Hamdan, both as to his competency and to his ability to assist in
3 his defense. Right?

4 A [DR. KERAM]: Yes.

5 Q [MR. MURPHY]: Now, you listed government-caused factors that
6 may have caused or contributed to his PTSD, such as the allegation
7 that he was allegedly sexually humiliated; that comfort items were
8 allegedly removed from him; that allegedly there was interference
9 with his medical care; and allegedly there was sleep deprivation.
10 Those are factors you've listed as contributing or causing PTSD.

11 A [DR. KERAM]: No, sir. That's not correct.

12 Q [MR. MURPHY]: No? Then what are those factors that I just
13 read?

14 A [DR. KERAM]: Those were the factors that contributed to the
15 coerciveness of the interrogation process.

16 Q [MR. MURPHY]: So it's not your testimony that those factors
17 aggravated his PTSD?

18 A [DR. KERAM]: They certainly would--they certainly aggravated
19 his symptoms, but they were not the cause. They were not the A
20 criteria, with the exception of the sexual humiliation and
21 degradation that he experienced.

22 Q [MR. MURPHY]: Did you determine a cause of his PTSD?

23 A [DR. KERAM]: Yes.

1 Q [MR. MURPHY]: And what was that?

2 A [DR. KERAM]: I will go in chronological order.

3 The first is the witnessing the Arab being killed in front
4 of him at Takht-i-Pol. The next are the beatings that he suffered
5 when he was in the custody of the Afghanis before he was taken into
6 American custody. He and I didn't talk very much about his time in
7 the Panjshir Valley. I note that he was beaten there. He was then
8 brought back to Bagram. And the chronology of some of this I have to
9 review each time, but I'm sure I'm not alone in that.

10 During the time that he was in Afghani custody and then in
11 Bagram, the first and the second time, there were times that in which
12 he felt his life was in immediate peril, that he was about to be
13 killed, particularly when an American interrogator placed a gun on
14 the table or told him that they would kill or beat or torture him if
15 he didn't do certain things.

16 Let's see. There was--he made a brief mention of sexual
17 trauma while he was I believe at Bagram, and then here at Guantanamo
18 he suffered those sexually degrading and humiliating treatments. And
19 so those would be the A criteria that he experienced. I'm sure I'm
20 forgetting some of them, but that would be the--I believe the
21 most--the ones that he cited most to me.

22

23

1 Q [MR. MURPHY]: All right. And that was your complete list of
2 factors you found?

3 A [DR. KERAM]: No. I said I'm sure that there are others that
4 I'm not bringing up right this moment.

5 Q [MR. MURPHY]: The facts that you can articulate today?

6 A [DR. KERAM]: At this moment. Yes.

7 Q [MR. MURPHY]: Largely, those are which you would call
8 government-caused factors. Is that correct?

9 A [DR. KERAM]: Well, certainly the Afghanis were not part----

10 Q [MR. MURPHY]: You separated that out.

11 A [DR. KERAM]: Yeah.

12 Q [MR. MURPHY]: The majority, though, of that list is what you
13 would call government-caused factors. Is that right?

14 A [DR. KERAM]: Yeah. Yes.

15 Q [MR. MURPHY]: You didn't list any of his own alleged
16 voluntary activity while he was associated with Osama bin Laden as a
17 causal factor in causing his PTSD. Correct?

18 A [DR. KERAM]: Yes.

19 Q [MR. MURPHY]: Correct?

20 A [DR. KERAM]: Yes. I can explain that. Yes.

21 Q [MR. MURPHY]: But you didn't list them. Did you?

22 A [DR. KERAM]: No.

23

1 Q [MR. MURPHY]: All right. For example, you didn't list the
2 possibility of transporting two surface-to-air missile systems to the
3 frontline of a battlefield as a possibly causing PTSD. Right?

4 A [DR. KERAM]: That's correct.

5 Q [MR. MURPHY]: And you didn't list digging out the body of Abu
6 Hafs Al-Masri, a high-ranking al Qaeda member, from the rubble of a
7 coalition-bombed building as possibly causing PTSD. Did you?

8 A [DR. KERAM]: No. But I--I do believe that the weeks prior to
9 the event at Takteh-Pol were sort of the beginning of an escalation
10 of anxiety. So it wouldn't necessarily be diagnosed as PTSD. He
11 didn't suffer an A criteria trauma that would qualify him for that.
12 But that period of time where things--Kandahar was being bombed and
13 so forth would--they don't meet, they don't rise to the level of an A
14 criteria, but they certainly produced anxiety in him.

15 Q [MR. MURPHY]: My examples, Doctor, could evacuating Osama bin
16 Laden and high-level al Qaeda leaders after the attack of the East
17 Africa bombing and after the attack of 9/11, could that cause or
18 aggravate PTSD?

19 A [DR. KERAM]: Can you tell me what occurred during those times
20 that would meet the A criteria for PTSD?

21 [END OF PAGE]

1 Q [MR. MURPHY]: Well, for example, after the African, East
2 African bombing, Mr. Hamdan and Osama bin Laden were expecting a
3 military retaliatory strike. Surely that would create or potentially
4 cause PTSD. Right?

5 A [DR. KERAM]: No. I mean, most soldiers in the American Army
6 who serve in theater are exposed to those conditions and don't
7 develop PTSD. If you don't mind, I can read you the A criteria.

8 Q [MR. MURPHY]: You have gone over that in your direct, so I
9 think we know and are familiar with what you provided previously.

10 CTC [MR. MURPHY]: Your Honor, the defense has advised me that
11 they do not oppose showing what is marked as the next appellate
12 exhibit in order, which will be numbered 252 and is labeled in our
13 material as exhibit 64. With the permission of the court, I would
14 like to display it to all, to the defense counsel, the witness, and
15 gallery. It's not classified information.

16 MJ [CAPT ALLRED]: Can I see it first?

17 CTC [MR. MURPHY]: Certainly, Your Honor. I would ask that our
18 document, 64, be shown to the military judge.

19 MJ [CAPT ALLRED]: You may show that to the witness and to the
20 gallery.

21 [END OF PAGE]

1 Q [MR. MURPHY]: All right, Doctor. Now before you is what I
2 would offer as the next, Appellate Exhibit 252. And I believe
3 there's no objection.

4 **[Appellate Exhibit 252.]**

5 Q [MR. MURPHY]: All right, Doctor, do you recognize the people
6 in this image?

7 A [DR. KERAM]: Is that Mr. Hamdan in the middle there? I
8 don't--I can't tell who is who.

9 Q [MR. MURPHY]: Apparently, at least on mine as well, there's a
10 circle in the center box is blocking part of the picture.

11 MJ [CAPT ALLRED]: Tech Sergeant Gibbs, how about working some
12 magic on that. Can you see it? It says resolution notifier.

13 CTC [MR. MURPHY]: It's appearing on this as well. May I
14 approach?

15 MJ [CAPT ALLRED]: Sure.

16 DC [LCDR MIZER]: We don't have a box.

17 Q [MR. MURPHY]: Well, there's an image right behind you,
18 Doctor, that has no blockings on it. I will ask you again, do you
19 recognize the people in this image?

20 A [DR. KERAM]: I believe I do. I may be wrong.

21 Q [MR. MURPHY]: And I won't hold you to it.

22 A [DR. KERAM]: Okay.

23

1 Q [MR. MURPHY]: But give us your best belief.

2 A [DR. KERAM]: On the left, I believe that's Osama bin Laden.
3 In the middle, I believe that's Mr. Hamdan. And I don't know who
4 that is on the right.

5 Q [MR. MURPHY]: All right. Let me ask you, Doctor, could
6 standing next to the most dangerous terrorist in the world, defending
7 him, guarding him, transporting him, transporting his weapons, his
8 security frequency codes, being in fear of a predator landing, a
9 hellfire missile on top of him, could that voluntary behavior on his
10 part cause or aggravate PTSD?

11 A [DR. KERAM]: Yeah. You know, I think--I think any--if Mr.
12 Hamdan--this is why you really need to be specific and give specific
13 examples.

14 If Mr. Hamdan either, you know, during the type of
15 conditions that you just mentioned or that you previously asked me
16 about experienced any of the A criteria, then he could--those could
17 have caused PTSD.

18 Q [MR. MURPHY]: So there could be reasons, other than what
19 we've talked about generally as government conduct, that could be
20 either a possible cause or an aggravating factor to his PTSD?

21 A [DR. KERAM]: That's correct. There can be many etiologies,
22 many A criteria. But that's why you need to have specific--not just
23 sort of this general. As a forensic psychiatrist, I'm looking for

1 the actual event.

2 Q [MR. MURPHY]: I'm going to move on from this line. I no
3 longer need to display the image.

4 Let's talk a little bit about your testimony that you
5 highlighted as particularly important yesterday regarding the
6 allegation of humiliating sexual contact. You stated that Mr. Hamdan
7 suffered as a result of a female interrogator having contact with
8 him, allegedly touching his groin. Is that right?

9 A [DR. KERAM]: Yeah. That's what--actually, you know, what
10 he--I wasn't allowed to be present when he disclosed this to Dr.
11 Schmitz. And our interview was ended at some point when we
12 were--when he was discussing that. So I'm not sure how much Dr.
13 Hamdan told Mr. Schmitz at that time, because I think then he and
14 Charlie went back and got the rest of the story. I'm sorry, Mr.
15 Swift went back.

16 So what I had learned about was the touching of the leg.
17 It's difficult for Mr. Hamdan to refer to parts of the anatomy that
18 become more and more sensitive, if you will.

19 Q [MR. MURPHY]: But you heard his testimony in court. Correct?

20 A [DR. KERAM]: Yes.

21 [END OF PAGE]

22

23

1 Q [MR. MURPHY]: And he specifically said that this female
2 interrogator eventually, he did say--it took some doing, but
3 eventually said she touched him in the groin?

4 A [DR. KERAM]: Yes.

5 Q [MR. MURPHY]: Do you completely accept this allegation as
6 true?

7 A [DR. KERAM]: I believe that it's true.

8 Q [MR. MURPHY]: What is this allegation based on?

9 A [DR. KERAM]: On his report.

10 Q [MR. MURPHY]: Is there any----

11 A [DR. KERAM]: And the report of--you know, if this was a
12 single report of a detainee, I would not give it as much weight. But
13 I've seen primary source documents of eye witnesses, of detainees who
14 have witnessed other similar events, and so that lends its
15 credibility.

16 Q [MR. MURPHY]: Regarding Mr. Hamdan's allegation, however,
17 whether it exists or not the facts come exclusively from him. Right?

18 A [DR. KERAM]: Yes. That's correct. Yes.

19 Q [MR. MURPHY]: Let's talk now regarding an area that you also
20 spent some time now, the gastric feeding tube issue.

21 A [DR. KERAM]: Yes.

22

23

1 Q [MR. MURPHY]: You described in some detail the forced feeding
2 of Mr. Hamdan here at Guantanamo Bay?

3 A [DR. KERAM]: Um-hmm.

4 Q [MR. MURPHY]: And you cited possibly medically inappropriate
5 procedures that were carried out in this forced feeding. Is that
6 right?

7 A [DR. KERAM]: Yes.

8 Q [MR. MURPHY]: One of the procedures you described that may
9 have involved a gastric tube was the diameter of the tube, and you
10 said that it was medically inappropriately large.

11 A [DR. KERAM]: No. I think that that's a mischaracterization
12 of my testimony.

13 Q [MR. MURPHY]: How would you phrase it, Doctor?

14 A [DR. KERAM]: What I believe I said was that given the
15 diameter of the tube and the lack of--and, again, I want to separate
16 out the force feeding into two events. One occurred in the hospital,
17 and I have no trouble with that at all. The other occurred at Camp
18 Oscar, and that's where I have the problem. Okay?

19 And then to get back to what I testified to yesterday.
20 Given the size of the bore, of the tube, it needed to have a topical
21 anesthetic placed on it and his nose needed to be prepped to have it
22 inserted. And according to Mr. Hamdan's report to me, those two
23 things were done with smaller bore tubes under medical supervision in

1 the hospital, but they were not done with the larger bore tube when
2 he was force fed in Oscar when it wasn't clear if that force feeding
3 was administered by medical personnel.

4 Q [MR. MURPHY]: Doctor, the information about whether this was
5 medically appropriate or not, that's all coming from Mr. Hamdan.
6 Correct?

7 A [DR. KERAM]: That's right. I was relying on the report. And
8 the report, again, there was--any time I have Mr. Hamdan saying
9 something to me, I'm going to try to look to verify it either in the
10 record or through other sources. I don't just take his word at face
11 value. I look for other sources to support it.

12 There--from the records that we've received to date, I
13 don't have a record from that period of time of what happened in
14 Oscar. But I then went to secondary and tertiary sources to see what
15 I could find, and there was an article in the New York Times in
16 February of 2006 describing the same treatment of other detainees
17 receiving force feeding, not in the hospital, also in an attempt to
18 stop the hunger strike.

19 Q [MR. MURPHY]: So your corroboration is a press report. Is
20 that right?

21 A [DR. KERAM]: That's correct.

22

23

1 Q [MR. MURPHY]: You have no corroboration from the medical
2 records in relation to Mr. Hamdan. Right?

3 A [DR. KERAM]: I have not received medical records from that
4 period.

5 Q [MR. MURPHY]: And so your source is Mr. Hamdan on this.
6 Correct?

7 A [DR. KERAM]: Yes. And then, like I said.

8 Q [MR. MURPHY]: And would it be fair to say that Mr. Hamdan has
9 no medical training?

10 A [DR. KERAM]: Absolutely. That's true.

11 Q [MR. MURPHY]: He's not capable of making an expert medical
12 opinion like you are about whether a procedure is medically
13 appropriate or not?

14 A [DR. KERAM]: No. That's not an opinion that he offered me.
15 I just asked him to describe what happened to him.

16 Q [MR. MURPHY]: You seem to accept this claim on the gastric
17 tube in the same way that you accept the claim of sexual humiliation
18 without additional corroboration. Or, I guess I might say, except
19 for the corroboration in the press account?

20 A [DR. KERAM]: Well, the press account relates to the force
21 feeding. The sexual humiliation and degradation, there are other
22 sources that are not press related that support his report.

23

1 Q [MR. MURPHY]: But none specific to Mr. Hamdan?

2 A [DR. KERAM]: None specific to Mr. Hamdan. No.

3 Q [MR. MURPHY]: Finally, on gastric feeding, generally, are you
4 aware medically as to why someone would be restrained several hours
5 after the gastric feeding?

6 A [DR. KERAM]: There are a number of reasons why one might do
7 that. Not under the conditions that Mr. Hamdan was, in a safety
8 chair. But in the hospital, there are a number of reasons why one
9 might do that in a manner, you know, that's consistent with the
10 patient's safety and not causing more harm to him.

11 Q [MR. MURPHY]: And also not regurgitating the food that's
12 ingested. Right?

13 A [DR. KERAM]: Correct. That's what I mean. There's a number
14 of reasons why one might restrain somebody after a force feeding.
15 But not in a safety chair with the type of conditions that Mr. Hamdan
16 described.

17 Q [MR. MURPHY]: As reported by Mr. Hamdan.

18 A [DR. KERAM]: Absolutely. Where he was not allowed to get up
19 to go to the bathroom, where his head was restrained.

20 [END OF PAGE]

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23

1 Q [MR. MURPHY]: All right. Let's turn to my next topic, which
2 is conditions of confinement and the transfer between. Now, you've
3 had extensive experience with the Federal Bureau of Prisons system.
4 Is that correct?

5 A [DR. KERAM]: Yes.

6 Q [MR. MURPHY]: As I understand it, you either worked with them
7 or for them at one point. Is that right?

8 A [DR. KERAM]: Yes.

9 Q [MR. MURPHY]: You've worked, did I hear you say, Butner is
10 one of the facilities, FMC Butner?

11 A [DR. KERAM]: I worked in the FCI.

12 Q [MR. MURPHY]: Okay. And that, as I know----

13 MJ [CAPT ALLRED]: ----I'm sorry.

14 Q [MR. MURPHY]: And you can explain, is a facility within the
15 Federal Bureau of Prisons that has extensive psychiatric resources.
16 Is that correct?

17 A [DR. KERAM]: It doesn't--the FMC does. The FCI had a
18 different team of psychiatrists.

19 MJ [CAPT ALLRED]: What is the FCI?

20 WIT [DR. KERAM]: It's a Federal Correctional Institution.
21 They're--in the Federal Bureau of Prisons there are different types
22 of facilities. There are camps, there are maximum security
23 penitentiaries, and then there's the supermax and so forth. So we

1 use the initials of the facility. FMC stands for Federal Medical
2 Center; it's a hospital. FCI is a Federal Correctional Institution,
3 and it's an actual prison.

4 MJ [CAPT ALLRED]: Okay. I'm sorry, I interrupted your line.

5 CTC [MR. MURPHY]: That's fine.

6 Q [MR. MURPHY]: Doctor, you've dealt extensively with prisoners
7 charged with state and federal criminal offenses. Correct?

8 A [DR. KERAM]: Yes.

9 Q [MR. MURPHY]: Do you know the legal status of detainees held
10 at Guantanamo Bay?

11 A [DR. KERAM]: In what regard?

12 Q [MR. MURPHY]: Do you know the status that's been determined
13 by the Combatant Status Review Tribunals?

14 A [DR. KERAM]: Whether--you know, I think it's best if I stick
15 with my area of expertise.

16 Q [MR. MURPHY]: All right. Let me just say, do you understand
17 that they have been determined to be enemy combatants?

18 A [DR. KERAM]: My understanding is that they've been determined
19 to be unlawful enemy combatants.

20 Q [MR. MURPHY]: Essentially that is correct. Correct?

21 A [DR. KERAM]: Well, my understanding is that that's an
22 important distinction between being an enemy combatant and an
23 unlawful enemy combatant.

1 Q [MR. MURPHY]: Right. And I don't want to get into the
2 details of the CSRT.

3 A [DR. KERAM]: I wasn't going there. I was just----

4 Q [MR. MURPHY]: But let me ask you--I agree with what you just
5 said.

6 A [DR. KERAM]: Okay.

7 Q [MR. MURPHY]: Do you know that Mr. Hamdan has been judicially
8 determined by Judge Allred in this legal proceeding of his status?

9 A [DR. KERAM]: Yes. I believe that's what happened in December
10 last year.

11 Q [MR. MURPHY]: Right. Do you know what that determination
12 was?

13 A [DR. KERAM]: That he is an unlawful enemy combatant.

14 Q [MR. MURPHY]: And to say that fully, that he is an alien
15 unlawful enemy combatant. Is that your understanding?

16 A [DR. KERAM]: Yes.

17 Q [MR. MURPHY]: Okay. You would agree that these detainees and
18 Mr. Hamdan in particular, are not simply state court or federal court
19 defendants. Correct?

20 A [DR. KERAM]: You're really exceeding my level of expertise.

21 Q [MR. MURPHY]: There's a difference between what you see here--
22 ---

23 MJ [CAPT ALLRED]: That sounds like an argument to me.

1 CTC [MR. MURPHY]: All right. I'll move on.

2 Q [MR. MURPHY]: Based on your extensive work in prison
3 facilities, is there a difference, in your mind, in the security
4 concerns of holding detainees here and defendants in a state or
5 federal system?

6 A [DR. KERAM]: Well, as somebody who assesses risk, which is
7 what forensic psychiatrists do, we would be looking for the exact
8 same type of analysis of risk assessment regardless of whether you're
9 looking at, talking about a facility or not a facility. And then,
10 you know, if you're talking about a facility, it wouldn't matter
11 where it's located, it wouldn't matter what the person was charged
12 with. And--in terms of a difference in how you would analyze their
13 risk. You would look for the same factors in analyzing risk in any
14 type of setting, with the goal to be to keep the institution, the
15 staff, and other detainees and the detainee themselves safe.

16 Q [MR. MURPHY]: So you testified as to placement of Mr. Hamdan
17 in various camps here, and you've also testified about your
18 experiences in federal prison systems. You don't think there's a
19 difference in the analysis of placement when you're talking about an
20 enemy of the United States versus a state prisoner or federal
21 prisoner?

22 A [DR. KERAM]: Well, first of all, there are state and federal
23 prisoners who are enemies of the United States. Ted Kazinski, Eric

1 Rudolph. We have our own domestic terrorists. I've been involved in
2 evaluating members of the militia and so forth. And, as I said, when
3 you are talking about identifying risk factors, those risk factors
4 may be present in somebody regardless of what they're charged with.
5 And so you don't look at the charges, you look at the individual.

6 Q [MR. MURPHY]: Those other examples you've cited are people
7 not held at a military camp. Correct?

8 A [DR. KERAM]: That's correct.

9 Q [MR. MURPHY]: Would you agree that protecting young American
10 service members working at Guantanamo Bay is an extremely high
11 priority?

12 A [DR. KERAM]: Absolutely.

13 Q [MR. MURPHY]: You commented on one violation of Mr. Hamdan,
14 and that was throwing urine on a guard. You've called that, I
15 believe, a moderate violation?

16 A [DR. KERAM]: Yes. And I understand that that may seem as if
17 I'm not placing enough importance on that. But what--I think of
18 things in mild, moderate, and severe. Severe would be like a shank
19 attack.

20 Q [MR. MURPHY]: But in your mind, you don't evaluate that
21 conduct of throwing urine as a serious violation?

22 A [DR. KERAM]: No. Because it's not a threat to life or--yeah,
23 a threat to life.

1 Q [MR. MURPHY]: You also commented on the mass disturbance that
2 Mr. Hamdan was cited with, where several detainees were yelling and
3 banging on cell doors in unison?

4 A [DR. KERAM]: Yes.

5 Q [MR. MURPHY]: Should that behavior be viewed differently,
6 based on your experience here and based on your testimony at federal
7 prisons, should it be viewed differently when it's done by an enemy
8 of the United States in a military camp versus a civilian, a
9 defendant in civilian custody?

10 A [DR. KERAM]: Again, you know, what I'm looking at is the
11 behavior and not the charge or the status. I'm looking at the
12 behavior. The fact that there were four detainees involved and the
13 fact that after two warnings they stopped is what's important to me.

14 I absolutely understand that that is a situation that has
15 the potential to escalate. But it did not in this particular
16 instance.

17 Q [MR. MURPHY]: But my question is, is there a difference? Is
18 there a difference because it's happening here at GTMO with enemy
19 combatants as opposed to any other state or federal prison in the
20 United States, in your mind?

21 A [DR. KERAM]: I haven't thought of any.

22 Q [MR. MURPHY]: In your mind, there's no difference?

23 A [DR. KERAM]: I haven't thought of any.

1 Q [MR. MURPHY]: You would agree that Mr. Hamdan has a
2 disciplinary record. Correct?

3 A [DR. KERAM]: Correct.

4 Q [MR. MURPHY]: You've reviewed those records?

5 A [DR. KERAM]: Yes.

6 Q [MR. MURPHY]: And there is a need by Guantanamo officials to
7 address his discipline problem?

8 A [DR. KERAM]: Absolutely.

9 Q [MR. MURPHY]: Finally, there's a final area I want to turn to
10 where you make some comparisons. Did I hear you correctly in the
11 direct examination that you've compared Guantanamo Bay with the
12 actions of the North Vietnamese and made reference to the Hanoi
13 Hilton?

14 A [DR. KERAM]: No, I was not comparing Guantanamo Bay. I was
15 comparing--Mr. Swift's question to me was, what does sleep
16 deprivation remind you of psychiatrically?

17 Q [MR. MURPHY]: And what was your answer?

18 A [DR. KERAM]: The first thing that came to mind was the Hanoi
19 Hilton.

20 Q [MR. MURPHY]: Were you making--you were making plainly
21 comparison to the Hanoi Hilton and the Guantanamo Bay in that regard.
22 Correct?

23 A [DR. KERAM]: In regard to the interrogation technique of

1 sleep deprivation.

2 Q [MR. MURPHY]: Is it your testimony, in your view, and the
3 information you want this court to rely on, that FBI agents, other
4 agents, employees of the federal government and the United States are
5 doing things here that are equivalent to what the Vietcong did in
6 Vietnam?

7 A [DR. KERAM]: Based on the report of FBI agents who I've been
8 in contact with, Mr. Hamdan's report, and other reports about the
9 sleep deprivation, and based on the reports of what I have read
10 occurred to American POWs, the reports are the same.

11 Q [MR. MURPHY]: Have you treated American POWs who were
12 captured and held in Vietnam?

13 A [DR. KERAM]: Yes. I believe that I have one from North
14 Vietnam.

15 Q [MR. MURPHY]: And have you read the literature?

16 A [DR. KERAM]: Or two. Yes.

17 Q [MR. MURPHY]: You've read extensively, I'm sure, the
18 literature related to POWs and torture in Vietnam?

19 A [DR. KERAM]: Yes. And other theaters as well. I have other
20 POWs that I've treated.

21 [END OF PAGE]

22

23

1 Q [MR. MURPHY]: Are you saying that what the Vietnam veterans
2 experienced as POWs is in any way comparable to what's happening at
3 Guantanamo Bay?

4 A [DR. KERAM]: Certainly with respect to the sleep deprivation,
5 yes.

6 Q [MR. MURPHY]: So this is the perspective that you bring to
7 the court?

8 A [DR. KERAM]: I don't understand your question.

9 Q [MR. MURPHY]: Well, the fact that you think there's an
10 analogy between the Hanoi Hilton and certain practices in Guantanamo
11 Bay, that's a perspective that you bring to your work?

12 A [DR. KERAM]: Let me clarify for you. I'm talking about sleep
13 deprivation. Okay?

14 Q [MR. MURPHY]: In that area.

15 A [DR. KERAM]: In that area. There's certainly many things
16 that happened to American POWs at the Hanoi Hilton that I have not
17 heard reported occurred in Guantanamo. There are things that
18 happened in Guantanamo that I have not heard happen to American POWs
19 in the Hanoi Hilton. The overlap is in the use of sleep deprivation.

20 CTC [MR. MURPHY]: Your Honor, I have nothing further.

21 MJ [CAPT ALLRED]: Very good. Thank you.

22 CDC [MR. SWIFT]: No redirect, Your Honor.

23

1 **EXAMINATION BY THE MILITARY COMMISSION**

2 **Questions by the military judge:**

3 Q [CAPT ALLRED]: Let me ask you a question. I have come to
4 have this impression of Afghanistan under the Taliban as a very
5 violent place. I have seen or heard reports of a very strict
6 fundamentalist regime where people were punished summarily sometimes,
7 for violations of the code, Islamic code or whatever. I mean, do you
8 think it's possible that living in that regime, entirely independent
9 of the war or anything related to the war, could have affected Mr.
10 Hamdan or others by the violence that they witnessed on a day-to-day
11 basis there?

12 A [DR. KERAM]: Your Honor, if you will allow me just a minute
13 of latitude here to give you some background.

14 One thing that I have found is that almost all of my
15 preconceptions about life--what life was like for Mr. Hamdan during
16 the time that he lived in Afghanistan were incorrect. And if you
17 don't mind, I will give you an example.

18 When I viewed the CIA tape, I was very surprised by that.
19 I mean, he was carrying \$2,000. Who carries \$2,000? That was very
20 suspicious to me. And when I asked him about it, he said, "What was
21 I going to do with the \$2,000? I was driving my wife to the border,
22 and I wasn't going to leave it at home." And I said, "Put it in a
23 bank." And he said, "What bank?" And I verified that with people

1 who lived in Afghanistan or who had been there, that that's not
2 something that's commonly done. Okay?

3 So this is the type of thing that I mean. And I can give
4 you a hundred examples like that.

5 What I have heard from people, not Mr. Hamdan, but from
6 people who lived in Afghanistan under the Taliban was that they
7 actually--and this will sound completely foreign to the American ear,
8 that people appreciated the Taliban, the citizens appreciated the
9 Taliban, because they disarmed the citizenry. And that decreased a
10 level of violence for the first time in Afghanistan going back many,
11 many years through many civil wars and the Russian occupation.

12 So that people felt fear of the government of what they
13 might do if they broke rules, but that the day-to-day street violence
14 was actually reduced during the period of time that the Taliban was
15 on the ground.

16 So I think it's very hard for us to accept that, however we
17 have formed our conceptions, that they may be 90 degrees wrong or 180
18 degrees wrong. Or that they may be right, but we can't tell, until
19 we really educate and become expert in that. And the average citizen
20 has not done that. With one respect, Your Honor, in issues such as
21 the one that you raised. So.

22

23

1 Q [CAPT ALLRED]: So you don't think that it was common to have
2 weekly executions in the soccer stadium, or people shot because they
3 weren't wearing a beard or those kinds of things?

4 A [DR. KERAM]: I don't know. I don't know. I do not know.
5 And I also don't know to the extent, you know what the baseline level
6 of trauma of the citizen was that they were living with. You know,
7 it's like we see in refugees where they have a baseline level of
8 traumatic symptomatology chronically that they're just living with.

9 You know, I would not say that Mr. Hamdan absolutely did
10 not experience any A criteria before he hit Takteh-Pol that day. But
11 what I will say is that when I have taken a symptom review of him,
12 the events that he reports as what occurs to him in flashbacks--I'm
13 sorry, not flashbacks, in intrusive symptoms and nightmares happened
14 after, really, you know, the Arab who was shot in front of him. That
15 was the first time I think that he felt personally and individually
16 singled out for death. And that's a very common experience, for
17 example, with my combat veterans, where being under constant shelling
18 or in a fire--I shouldn't say firefight, but constant shelling or
19 mortar attacks and so forth. There's always that fear that you will
20 be killed in theater, unless you're in the rear with the gear, or
21 you're on R&R. But that when it comes to a firefight or
22 face-to-face, that's when you experience that individual imminent
23 fear of death that leads to the--that qualifies as an A criteria that

1 leads to symptoms.

2 Q [CAPT ALLRED]: Have you gained Mr. Hamdan's trust?

3 A [DR. KERAM]: I would have no way of knowing that. I don't
4 know that anybody has gained Mr. Hamdan's trust. I mean, he told me
5 in February that sometimes he thinks that we are interrogators, that
6 Mr. Swift is, that I am. He doesn't even know if this court is real
7 at times. He tries to maintain faith that it is and the humanity of
8 American human rights, or he would go crazy. But I don't know that
9 he has full and complete trust that we are who we say we are. In
10 fact, he told me that he doesn't.

11 I asked him the same questions that interrogators asked
12 him. That is very upsetting to him. So do his attorneys and his
13 translator by way of the translation. We do the same thing that the
14 interrogators do. We bring him food. You know. And it's very hard
15 for him, which I think makes sense, to fully place his trust when he
16 has done that before and it's been broken.

17 Q [CAPT ALLRED]: Well, the question I really want to ask
18 perhaps is whether you've attempted or might attempt to persuade him
19 to take a medication that would be good for him.

20 A [DR. KERAM]: I have done that. Yeah.

21 Q [CAPT ALLRED]: And the results were?

22 A [DR. KERAM]: He told me that he does not trust the physicians
23 here, and he does not want to seek medical care for things that there

1 are alternative treatments for. Like he was given back exercises by
2 PT for his sciatica, and he will go for medication for the sciatica.

3 But the exercises, trying to socialize, those other things
4 would help PTSD, but that he is fearful of the medical system here,
5 has no faith in it, believes that it can continue to be involved in
6 an interrogation process. Which it was, by the way, after counsel
7 was appointed. There's a note I believe from February 2004 where he
8 was--or March of 2004, where recreation time was withheld at the
9 request of Intelligence. So, you know, one can understand----

10 Q [CAPT ALLRED]: ----I'm not sure I know what to make of that.
11 But you found that note in the record, apparently.

12 A [DR. KERAM]: Yeah.

13 Q [CAPT ALLRED]: Okay.

14 MJ [CAPT ALLRED]: Well, any questions based on mine?

15 CDC [MR. SWIFT]: Nothing further, Your Honor.

16 CTC [MR. MURPHY]: No, Your Honor.

17 MJ [CAPT ALLRED]: Thank you, Doctor, for your testimony.

18 WIT [DR. KERAM]: Thank you.

19 **[The witness was excused.]**

20 MJ [CAPT ALLRED]: Okay. We've been in court for an hour. Does
21 anybody need a break? What's next?

22 CDC [MR. SWIFT]: I'd actually like to take a ten-minute break,
23 sir, for myself.

1 MJ [CAPT ALLRED]: Okay. We'll stand in recess.

2 **[The military commission recessed at 0955, 16 July 2008.]**

3 **[The military commission was called to order at 1021, 16 July 2008.]**

4 MJ [CAPT ALLRED]: Okay. Please be seated. The court is called
5 to order.

6 I believe we have argument then on the conditions of
7 confinement motion?

8 TC [LCDR STONE]: Yes, Your Honor. Good morning, Your Honor.

9 MJ [CAPT ALLRED]: Good morning. Oh, by the way. I assume
10 there's no objection from the defense to me considering this
11 affidavit from Colonel Vargo. It was kind of handed to me. I don't
12 know; it was attached to the motion several months ago or whatever.

13 DC [LCDR MIZER]: Sir, I think both the prosecution and defense
14 have talked and have come to the conclusion that all of the
15 affidavits or documents that were attached to motions were actually
16 considered eligible for your consideration. So I think we're both
17 going to be arguing from them at various points.

18 TC [LCDR STONE]: And specifically, Your Honor, Appellate
19 Exhibit 199, which I think was Dr. Keram's affidavit, which was
20 attached to the competency motion, we would like to have that
21 considered for purposes of this motion. She referred to it in her
22 testimony.

23 MJ [CAPT ALLRED]: Okay.

1 DC [LCDR MIZER]: Your Honor, it's a long established principle
2 in American and English common law that individuals shall not be
3 punished before a proper adjudication of guilt. It dates back at
4 least to the time of the Magna Carta signing in 1215. It's
5 reinforced in Common Article 3 of the Geneva Convention, where the
6 Geneva Convention states that: No person shall be punished except by
7 a regularly constituted court.

8 There has not been judgment in this case yet, and yet Mr.
9 Hamdan is being punished. It's also in Article 13 of the Uniform
10 Code. I think, just to stress, that in 1950 there was no acceptance
11 as there is today that due process and many of the constitutional
12 rights would apply to service members. And that principle was so
13 important that Congress set it out, that no service member should be
14 punished before an adjudication of guilt.

15 There can be no doubt in this case that Mr. Hamdan has been
16 punished. He's been kept in solitary confinement for in excess of
17 two years, if you look at the confinement records. The prosecution's
18 argument is that it's not solitary confinement because we don't call
19 it solitary confinement. Federal courts have defined conditions
20 identical to those in which Mr. Hamdan is presently incarcerated as
21 solitary confinement. I'm referring to the *Sulaiman* case and the
22 *Gandhi* case where they check off every single criteria that could
23 describe Mr. Hamdan's current conditions.

1 *Sulaiman* is interesting because it is a terrorism case,
2 Your Honor. Mr. *Sulaiman* was involved--alleged to have been involved
3 in bomb-making in the 1993 World Trade Center bombing. And if you
4 read the--the district court's opinion in that case--they chastised
5 the government for making some of the arguments that the government
6 has made in this case; that, because of Mr. *Hamdan*'s offenses are
7 similar to the case of Mr. *Sulaiman*'s offenses, alleged bomb-making,
8 that he had to be kept in solitary confinement like Mr. *Hamdan*.

9 Dr. *Keram* says so as well. She says that these conditions
10 of confinement are solitary confinement, but they're not what you
11 would find in a federal facility, and certainly not for someone who
12 is a pretrial detainee. They're not even in a federal penitentiary.
13 She mentioned *Ted Kazinski* and several domestic terrorists, Your
14 Honor, but the government can't deny that we have international
15 terrorists of this same organization incarcerated in the United
16 States. *Zacharias Moussaoui*, *Richard Reid*. These individuals have
17 been incarcerated and have not been subjected to these punitive
18 conditions of confinement.

19 So even if a previous crime were to somehow justify, serve
20 as a justification for punitive conditions of confinement, it has not
21 been imposed in other circumstances, which indicates that it's not
22 really and truly necessary, Your Honor, and again reveals the purpose
23 of this as punishment.

1 Mr. Hamdan also tells you that this is solitary
2 confinement, Your Honor. He said that Camp Echo was like a tomb,
3 like a graveyard, where he's there alone for--when Camp Echo was
4 first established, there was no light, no exercise.

5 As part of the conditions of confinement, we see that his
6 medical treatment has also been interfered with. Your Honor. And I
7 would invite the Court's attention to Appellate Exhibit 199, which is
8 Dr. Keram's affidavit. And I think these entries--I'm not going to
9 put them up because these I believe are FOUO if not classified
10 because of the names of the individuals involved.

11 These entries are disturbing, Your Honor, but quite
12 frankly, I mean, here's one of the entries. On February 19, 2004, no
13 rec time, per intel. And this is after Dr. Keram and, indeed, the
14 camp physicians have said that Mr. Hamdan because of sciatica needs
15 rec time, it is one of the things that is medically necessary. And
16 here, in black and white, is: Per FBI, special request for medical
17 treatment, documenting some of the things that Dr. Keram has alleged
18 and that Mr. Hamdan has alleged.

19 Which gets to the point of exercises generally, Your Honor,
20 for purposes of Mr. Hamdan's confinement. The government in the
21 affidavits says that Mr. Hamdan is allowed to recreate at least two
22 hours every day. But if you look at the PIMS records, it suggests
23 otherwise, again, in black and white. The government even puts in

1 some of these statements in its response. They say: Mr. Hamdan was
2 allowed to recreate for 287 out of 351 days. What happens to the
3 other 64 days out of that almost one-year period? So a statement
4 that Mr. Hamdan is allowed to recreate two hours every day is simply
5 not true, according to the government's own documents in this case.

6 Your Honor, when you look to the seven Kennedy, Mendo-
7 Martinez factors that are set forth in the brief in which federal
8 courts look to determine whether an individual has been punished,
9 those factors all point to the fact that Mr. Hamdan has been punished
10 in this case. This action involves an affirmative disability or
11 restraint. It's historically been regarded as punishment, and I
12 think that that's very true in the case of solitary confinement. It
13 was outlawed in the military shortly after the passage of the Uniform
14 Code of Military Justice, and on and on.

15 Really, the government can only dispute two of those
16 factors, number 6 and number 7: An alternative purpose may
17 rationally be assigned to it; and, that it appears excessive in
18 relation to the alternative purpose assigned to it.

19 Your Honor, the District Court in Washington, D.C. had no
20 problem reaching its decision. On November 8, 2004, it ordered that
21 Mr. Hamdan be removed from the punitive conditions of confinement and
22 released to general population. If you look at the confinement
23 records in this case, the government simply ignored that order. They

1 did not move Mr. Hamdan on November 8, 2004. And, in fact, on March
2 30, 2006, they placed him back in detention along with other pretrial
3 detainees.

4 Turning to the sixth factor, whether or not an alternative
5 purpose may rationally be connected or assigned to it. The
6 government will stand in a few moments and will point out 84
7 disciplinary infractions over period of almost seven years. And it
8 sounds very ominous, and I think Dr. Keram talked to you a little bit
9 about this. You've got to peel the layers of that onion back a
10 little bit, though, to really examine what those incidents are. And
11 I think if--they're set out on page 5 of the reply brief, where one
12 of them involves an overdue library book, defacing a library
13 magazine, touching the recreation fence during rec time, possessing
14 the equestrian magazine, Australian Performance Horse. One moment,
15 Your Honor. I believe the Australian Performance Horse belonged to
16 Mr. Hicks. Altering his mattress; having extra toothpaste;
17 possessing toothbrushes and apple core, an extra apple; an
18 unauthorized book on the Koran; having unapproved notebook paper; on
19 four occasions having extra clothing, including socks, a thermal
20 blanket, shirts and pants. And it goes on and on, Your Honor.
21 Having extra condiments, salt and pepper, has landed Mr. Hamdan in
22 disciplinary trouble. So you really have to look at those 84
23 infractions when you're considering this.

1 I'm not going to stand here and tell you that Mr. Hamdan
2 didn't allegedly throw urine at a guard on August 8, 2005, almost
3 three years ago. He was punished for that. He was placed in
4 administrative segregation for an unspecified amount of time, in his
5 disciplinary record. And that's what you do. I think that's what
6 Dr. Keram testified that you would do for that sort of incident,
7 would be punishment. The government can't stand here and argue that
8 Mr. Hamdan should be held in solitary confinement in perpetuity
9 because of something that he did three years ago.

10 There are also two alleged threats of assault. One came
11 before he was placed in Camp Four, Your Honor. And that should
12 indicate the seriousness with which the government took that threat
13 of assault.

14 The second took place after Mr. Hamdan alleged in the
15 record to threaten to break the hand of a guard, and he was let off
16 with a verbal warning after the guards discussed it. And that again
17 should indicate the seriousness. We're not talking, as Dr. Keram
18 suggested, about a prison shank. We're not talking about any real
19 threat of violence if an individual is given a verbal warning and
20 that's it. Your Honor, he received more punishment for having extra
21 salt packets in his room than he did this alleged assault. We don't
22 know any more than that with respect to this incident.

23

1 Mr. Hamdan, there is no credible evidence that he is a
2 danger to himself or to others and could not be placed in less
3 punitive conditions of confinement. And, Your Honor, essentially
4 what the government--one of the big points that the government makes
5 in its response is that other guards--or, other detainees are
6 dangerous and so, therefore, Mr. Hamdan must be put in these same
7 conditions. Other detainees have launched a conspiracy to assault
8 guards, other detainees have attempted to hijack a food truck and
9 commit a conspiracy. It looks eerily similar to their case on the
10 merits, which is other people have done things and Mr. Hamdan knew
11 them or was around them, and so, therefore, Mr. Hamdan should be
12 punished. You have to look at what Mr. Hamdan did, Your Honor, when
13 you're making the decision as to whether or not the government is
14 illegally punishing.

15 The last factor is whether or not the conditions of
16 confinement are excessive in relation to the purpose assigned to it.
17 Now, the government will say that, again, these are the most
18 dangerous men in the world. A principle purpose here, Your Honor,
19 should be ensuring Mr. Hamdan's presence at trial. And the defense
20 would concede that the government has some responsibility of ensuring
21 the national interest--of protecting national security is probably
22 the best way to say it.

23

1 We have a camp here that can do that, at Camp Four. There
2 are a number of inmates in that camp, including men like Omar Khadr
3 who are alleged to have committed far more serious misconduct than
4 driving members of al Qaeda around Afghanistan, which I think gets
5 back to equal protection. Again, you get different treatment based
6 upon who you are, your citizenship at this camp. I think that's
7 evident by Mr. Hicks, the Hicks case.

8 We're not asking for bail, Your Honor. We're not asking
9 that Mr. Hamdan be released. But we are asking that he not be
10 punished before an adjudication of guilt. There hasn't been an
11 adjudication of guilt. And if you look at his cases through those
12 seven factors, Your Honor, I think it is plain that Mr. Hamdan is
13 being punished.

14 We would ask for the confinement credit requested in our
15 brief. Importantly, these conditions of confinement are frustrating
16 our ability to present this case. There are days that are lost. I
17 think Ms. Prasow's affidavit demonstrates that. Not always can we go
18 in with Mr. Hamdan say, we are here, we're ready to work.

19 So there's really two purposes for this. One is to punish
20 the government, if you will, for unlawfully punishing Mr. Hamdan.
21 But the second is to put him in conditions that allow him to
22 cooperate and to participate fully in his defense, not to move in and
23 out of competency, where we have days that are completely lost

1 because Mr. Hamdan is mentally lost, but where we can go in and
2 actually cooperate and prepare his defense adequately.

3 And, Your Honor, I would urge you not to push off or put
4 off the issue of confinement credit until a later date, and for this
5 reason. The United States government has ignored a federal judge in
6 this case. I think that there's one thing that they would
7 understand, which is two for one, three for one, four for one
8 confinement credit for continuing the punitive conditions of
9 confinement. At least I hope that they would recognize that. And I
10 believe that that would address our concerns.

11 If there are no questions, Your Honor?

12 MJ [CAPT ALLRED]: No, I do have some questions. I remember
13 reading in your brief this recitation of Mr. Hamdan's disciplinary
14 infractions, the library book and the magazine and whatnot. Was
15 there evidence attached to your brief from which I could examine his
16 disciplinary record? Or do the parties concede that that recitation
17 is accurate? I don't remember seeing anything beyond the brief.

18 DC [LCDR MIZER]: We can make that happen, Your Honor. The
19 problem with that is the document is SECRET. And so we will need to,
20 I guess, print it off. We can submit that to the court.

21 MJ [CAPT ALLRED]: Can we work that out?

22 TC [LCDR STONE]: Yes, sir. That's not a problem.

23

1 MJ [CAPT ALLRED]: The other question I have. The affidavit of
2 Colonel Vargo, I think was his name, says that Camp Four is for
3 people who really toe the line, and that it's important to have zero
4 tolerance of any infractions there. My sense is that even if I
5 ordered Mr. Hamdan returned to Camp Four, it wouldn't be long before
6 he would have a little flare-up and the problem would be out in our
7 lap again.

8 DC [LCDR MIZER]: Well, Your Honor, my response to that would
9 be, let's see. Let's see what Mr. Hamdan does in Camp Four, and
10 whether or not there's even a salt packet discrepancy in Camp Four.

11 I agree that Mr. Hamdan should not be there if he's a
12 violent offender or committing major violations of camp rules. But
13 these things have been called--and can even these for--these things
14 that are called mass disturbances. I think that it would help our
15 case tremendously if Mr. Hamdan was moved into that camp. And if he
16 for some reason cannot comply with camp rules at that point, then we
17 will accept responsibility.

18 MJ [CAPT ALLRED]: Okay. I need a chronology. I am seriously
19 confused by the evidence about where he was and when. I don't know
20 when the month of Ramadan is, for example. And the presentation from
21 Mr. Hamdan's testimony wasn't necessarily chronological. So I would
22 ask either the parties to agree on a chronology, or you can prepare
23 an affidavit or something, so I can better understand that. I'm

1 going to struggle going through my notes of his testimony trying to
2 figure out exactly where he was, when he was moved, why he was moved,
3 which ones were explained, which were not explained.

4 TC [LCDR STONE]: Sir, I do have, it's--there are those.
5 They're in existence, and we can probably--it will take us a little
6 while to get it mashed out. But in terms of getting you a chronology
7 of where he moved, at what time, and at what point he may have moved
8 from what would be the single cell detention to some other place.

9 MJ [CAPT ALLRED]: Fair enough.

10 DC [LCDR MIZER]: Camp Four, and otherwise.

11 Sir, if I could continue to respond to your question.

12 Dr. Keram testified that he would improve almost
13 immediately, and in many respects a very rather vicious cycle that
14 conditions of confinement cause irritability and noncompliance, and
15 then noncompliance then perpetuates the conditions of confinement
16 that cause the same symptoms. I think that Dr. Keram is correct
17 about that; if we could give him a chance at Camp Four, his symptoms
18 would improve.

19 Further, Your Honor, I think the record would reflect that
20 Omar Khadr was sent to Camp Four again because of the Canadian
21 government. I think that the prime minister has essentially stated
22 that in front of Parliament, that we're the reason that Omar Khadr is
23 in Camp Four. So I don't know that the government can credibly make

1 an argument that this is only for individuals.

2 MJ [CAPT ALLRED]: Well, there's no evidence before me of Omar
3 Khadr's compliance with the rules or his disciplinary infractions or
4 anything else by which I might really compare Mr. Khadr's case to Mr.
5 Hamdan.

6 DC [LCDR MIZER]: Certainly, Your Honor.

7 MJ [CAPT ALLRED]: Okay. That's all I can think of right now
8 for the defense.

9 TC [LCDR STONE]: Sir, I'm going to first start with something
10 that the defense said which I think is irresponsible in their
11 argument. They make the outlandish claim that the United States
12 military and the Department of Defense did not, and blatantly
13 violated a district court judge's rule. And that's ridiculous and
14 it's wrong. What was attached to one of their filings was the
15 district court order. I'd ask you to take a look at it.

16 What it says: It is further ordered the petitioner be
17 released from the pre-commission detention wing of Camp Delta.
18 That's the Papa Block----

19 MJ [CAPT ALLRED]: Just a moment. Mr. Hamdan either doesn't
20 hear. What's he saying? He can't hear? Oh, you're talking so loud
21 that he can't hear the Arabic in his headset. Step back from the
22 microphone maybe would help. Go ahead.

23

1 TC [LCDR STONE]: What it says is that the petition being
2 released from the pre-commission detention wing of Camp Delta. The
3 Vargo affidavit says that's Camps One, Two, and Three, single-cell
4 detention, where he gets to talk to people, which all this the
5 defense in their brief actually asks as an alternative relief that he
6 be sent to.

7 So to sit up here and say that he gets some sort of three
8 for one credit because they violated a U.S. District Court order is
9 absurd, it's ridiculous, and it's irresponsible.

10 Now, it also says here--and if you remember what Mr. Hamdan
11 testified to, that when he was in Papa, he was actually with his
12 friends, people that he talked to and could reminisce with.

13 So, unless some reason other than pending charges against
14 him requires different treatment.

15 Now, that means Mr. Hamdan gets to be treated like every
16 other detainee in Guantanamo Bay. And they have shown absolutely
17 nothing, zero, one thing that he has ever singularly been treated
18 differently than any other detainee, period. And I will go through
19 my argument, if you think I haven't been arguing yet.

20 MJ [CAPT ALLRED]: Well, I was going to ask you to turn down the
21 volume and the rancor just a little bit.

22 TC [LCDR STONE]: Yes, sir.

23 MJ [CAPT ALLRED]: Thank you.

1 TC [LCDR STONE]: Now, let's start with the legal analysis.
2 Step one is that this is a case in a court of limited jurisdiction.
3 And where that applies is when the defense asks for this Peer-Suzuki-
4 Allen-Article 13 analysis. Article 13, sir, as you know, under the
5 rules is not in the M.C.A.

6 It's not that Mr. Hamdan isn't treated in accordance under
7 Article 3, offered humane treatment, et cetera. He is. It's laid
8 out in the briefs. It's very clear that that is being met here in
9 Guantanamo.

10 Now, what you have is, an Allen credit is based on the
11 day-for-day credit for pretrial confinement. We know what it's based
12 upon. Well, what we have is an enemy combatant held in accordance
13 with the laws of war in which he doesn't get pretrial credit for how
14 he's being detained. I don't want to spend any more time on it,
15 because that's something that is well known, well established, and I
16 think every party here is briefed on that.

17 Now, the second part of the analysis goes: So, that you
18 are to give broad deference to the military commanders to run their
19 detention facilities or military operations in the manner that they
20 need to do it. And what they need to do is there needs to be a
21 determination by the prison facilities or the detention camps'
22 operators, and have the freedom and the leverage to deal with threats
23 within the detention facility and run the detention facility for the

1 legitimate purpose and, as Colonel Vargo says, is the safe and
2 administrative operation of this camp.

3 That's not just for other detainees, because as we know
4 there are Afghans and there are a multitude of ethnicities with
5 potentially varying degrees of concern amongst themselves and the
6 guard force. So they need that broad deference.

7 Dr. Keram made comparisons with regards to the Bureau of
8 Prisons. But on cross-examination, Mr. Murphy elicited from her on
9 three occasions:

10 What's happening here is really not my lane. My words, her
11 sentiments.

12 "I don't know," was another thing that she said.

13 It's wrong and irresponsible to force on the JTF-GTMO
14 detention facility staff decisions made in the manner in which the
15 defense has put forward.

16 She also says that she's--you know, really, kind of a
17 serious incident is when a person pulls a shank or is able to get a
18 knife, or something that might cause danger. Well--and that we
19 should also, let's let the detainees blow off a little steam.
20 Allowing individuals to have a shank before you punish them or to
21 blow off a little steam has the real legitimate possibility of
22 needlessly sending another service member home in a body bag to his
23 parents. And I don't say that lightly, and I mean every word of it.

1 The point? It's not Dr. Keram, certainly not myself that
2 makes these points or decisions with regard to the detention
3 facility. It is, however, your decision. But, you must give those
4 operators that broad deference and trust our military commanders to
5 do the right thing, because they do.

6 If you use the constitutional analysis, which the defense
7 is so desperately trying to get you to do, even the constitutional
8 analysis says that you are to give broad deference to these people.

9 If you look back at that order, Judge Robertson gives JTF-
10 GTMO that deference. It's written in the order, the deference. Move
11 him from the precondition detention rink which was shut down Camp
12 Papa or Papa block of Camp Delta, which is what the accused testified
13 to yesterday. "Well, when the district court order came in, I was
14 moved and I went back to Camp Delta. I was first disbursed back
15 within the camp, back to the single cell detention." Unless, some
16 reason other than the petty charges requires him different treatment.

17 The point with that, sir, is there's the deference that the
18 district court recognizes grants to JTF-GTMO just as they do any
19 other facility.

20 So the standard--and I'm only talking standards so far--is
21 clear, it's met, and it's widely adopted.

22 Now, the Vargo declaration talks about the rational
23 legitimate government purpose. And as both cites--both cases, both

1 of these cited *Bell v. Batfish*, it talks about this legitimate
2 government purpose. I think probably the more appropriate way to
3 look at it is, does it mean the humane conditions of Common Article 3
4 within the context of what we've been doing here, the war on terror,
5 and humane treatment? Which, there's no--it's not brought up by the
6 defense, and it's certainly met by all standards. Its, humane
7 treatment is set out in the government's brief by the way that it's
8 humane treatment under U.S. law, which clearly, unambiguously, and
9 completely meets all Common Article 3 requirements, period.

10 But if we want to walk down the constitutional analysis of
11 *Bell* versus *Batfish*, I would be willing to go down that pathway, sir.
12 Rational, legitimate, government purpose. The safety of our young
13 men and women is paramount, and there's not a person in this room
14 that disagrees with that.

15 Now, with regards to JTF-GTMO. You have a collective
16 urgency, you have a rational basis for single cell detention with the
17 ability to demonstrate by that individual that lesser restraint is
18 necessary to the safe operation of that facility or is allowed.

19 The defense talks about solitary confinement, solitary
20 confinement. It doesn't meet the definition of solitary confinement
21 as set out in the government brief. It's not solitary confinement
22 even by many of the cases that the defense cites. Why? Because even
23 as Mr. Hamdan said, and he admitted to Dr. Keram, "Camp Five is noisy

1 because of the people talking," communicating between two hours of
2 recreation a day.

3 If you look at the analysis here as set out in the Vargo
4 declaration, he spent greater than one--for his time in Camp Six, he
5 was either, he recreated, he left the facility in excess of one time
6 a day, 354 times within 351 days. How in the world is that solitary?
7 How is that the complete removal of access to everything? It's
8 because it's not. Because the defense's motion is actually flawed.

9 One step farther. Even when you look at Camp Five, it was
10 he was out of the cell, I think it comes in to about 20 percent of
11 the time, one out of every five days, and recreated all but three
12 within the period of time in which the motion was brought, which was
13 actually I think the end of December through February. There's
14 certainly no evidence to suggest that there's anything different
15 going on now.

16 So if you look at the solitary confinement argument as a
17 whole, it legally fails, it factually fails. And what you're left
18 with is defense hyperbole. And we'll deal with the accused's
19 manipulation in a minute.

20 Well, you have an individual need, as JTF-GTMO says as
21 well, that individual need to deal with the government purpose:
22 Safe, effective operation of the facility. Where has there ever been
23 an intent to punish?

1 Mr. Hamdan, the accused, has a discipline record, admits
2 that he has problems following rules. Nonetheless, nonetheless, with
3 the discipline record the way that it is, which shows you the
4 deference that they get and the fact that they're not horrible
5 people, Mr. Hamdan worked his way up and was given the opportunity to
6 be in Camp Four like other detainees. It works. It's working.

7 Mr. Hamdan, although he certainly blames other individuals
8 in the guard force for, after his 36 day stay in Camp Four in which
9 he violated the rules and was removed, he was removed and put back
10 into single cell detention.

11 We submitted as the next appellate exhibit on the break the
12 guard force report of October 5th or October 6th, 2005, which shows
13 his removal from Camp Five. I'm sorry, removal from Camp Four. And
14 it shows where he had the opportunity, was afforded the privilege,
15 and was incapable of doing it. And it should not be lost on me nor
16 was it lost on you with respect to your questions which you gave to
17 the defense, especially in light of Dr. Keram's belief: He will
18 improve immediately if moved to Camp Four. He will be wonderful.
19 Roses will grow in the sand. However, 36 days after his initial
20 movement into Camp Four, he violated the rules.

21 But if you look at it, it goes deeper than just what the
22 defense would like you to see. The defense wants you to see that
23 Snickers bars were hidden somewhere or that he had extra salt

1 packets. It's instigating other detainees against the guard force.

2 MJ [CAPT ALLRED]: This was the 2005 incident?

3 TC [LCDR STONE]: Yes, sir.

4 MJ [CAPT ALLRED]: Okay. That was three years ago. You're not
5 going to get a lot of mileage out of that.

6 TC [LCDR STONE]: But that's what moved him out of Camp Four.

7 MJ [CAPT ALLRED]: Okay.

8 TC [LCDR STONE]: In 2007--so, I mean, it's important within the
9 context of what he is doing in Camp Four. Not that that should
10 otherwise prevent him. But in 2007, most recently this, what they
11 call as inciting a riot. Well, the defense really kind of pooh poohs
12 it, kind of laughs at it and mocks it, because it was a contained
13 event. Because he kicked on the guard--on the door of his cell and a
14 couple of others did and they kept it on for twenty minutes, and then
15 it was contained and then it stopped. Why do you think that was so
16 contained? Because those individuals were contained in single cell
17 detention.

18 It's a pattern that has continued with regards to Mr.
19 Hamdan instigating, talking to, convincing other detainees. And he
20 continues to do it in Camp Five. So a collective decision--and if
21 you read the Vargo declaration that talks about the wide latitude of
22 privileges given in Camp Four makes it a dangerous place. And then,
23 they want to move an individual that has a previous history of

1 instigation and a current history of instigation to Camp Four because
2 he will feel better?

3 MJ [CAPT ALLRED]: The current history being, what?

4 TC [LCDR STONE]: The most recent incident that he did in
5 December of 2007.

6 MJ [CAPT ALLRED]: Okay.

7 TC [LCDR STONE]: So the truth is, Hamdan has always been
8 treated consistently as other detainees in like situations. There is
9 a lack of any intent to punish. And, no, there is absolutely no need
10 in any way, shape, or form to modify or interfere with the Joint Task
11 Force.

12 Now, we need to talk a little bit about PTSD, manipulation,
13 and some of the statements that were also made. And to do this, you
14 need to look at the declaration of Emily Keram who says one of
15 the--this is on page 6: Among the events that were especially
16 traumatic to Mr. Hamdan, witness--Mr. Hamdan witnessed other
17 detainees being beaten at Bagram.

18 On the stand, the accused said, I didn't witness any
19 detainees being beaten at Bagram at all.

20 Now, I have not investigated whether any detainees were
21 beaten at Bagram or not. I certainly don't concede that any were.
22 But what we do know is that this had nothing to do with any traumatic
23 event or impact on Mr. Hamdan. And Dr. Keram's report of the

1 definition for a determination diagnosis--there's the right word--of
2 PTSD is based on a fact that Mr. Hamdan says isn't true. That is
3 manipulation. Flat, simple, plain, manipulation. Now, which
4 seriously, then, when you give Dr. Keram's cross-examination this
5 morning credit when you listen to her say, no, everything comes from
6 Mr. Hamdan and it's him. And then what I did is I went out and I
7 looked for other detainees that said that there might have been
8 abuse. And then, hey, Hamdan tells me the same thing; and,
9 therefore, it must be true.

10 Sir, this is the exact same thing with the beatings at
11 Bagram. She specifically outlined the same analysis that she came to
12 the conclusion about a beating in Bagram that the accused he didn't
13 witness with regards to this alleged sexual humiliation. Because
14 there were reports of a sexual humiliation done during what was
15 called advanced interrogation techniques in 2003, of which the
16 accused was never a part of.

17 Now, what should throw it over the top with regards to the
18 lack of credibility for this is not the Manchester Manual. Let's
19 just ignore that for the purposes of this motion. But let's go back
20 to the federal affidavit. That was signed by Mr. Hamdan, worked out
21 by his defense counsel in a very intelligent, effective way in 2004,
22 before the start of federal litigation.

23 Dr. Keram says that this was the singularly most traumatic

1 event that took place at GTMO, according to the accused and how he
2 has told her? Yet, this horrible thing doesn't show up in the
3 affidavit when the accused lists other types of abuse--that may or
4 may not have happened. The government's position of course is that
5 it hasn't. But this is something that gets fabricated after the
6 fact, which brings us now to the next piece, the manipulation.

7 MJ [CAPT ALLRED]: I'm not really interested in manipulation. I
8 think we're kind of far afield from the issues I need to resolve for
9 this motion.

10 TC [LCDR STONE]: Okay.

11 MJ [CAPT ALLRED]: I'm satisfied and Dr. Keram acknowledged that
12 he is manipulative and she was manipulated and others were
13 manipulated.

14 TC [LCDR STONE]: If I can say one sentence that Dr. Ritchie
15 specifically links manipulation to moving to Camp Four.

16 MJ [CAPT ALLRED]: Okay.

17 TC [LCDR STONE]: The last piece. Let's look at the Prasow
18 declaration, where Ms. Prasow says that there seems to be somewhat of
19 an impact on the attorney-client relationship. If you look at the
20 dates that she sets out, you will see, with respect to PTSD and the
21 conditions of confinement, she met Mr. Hamdan in April of 2007. In
22 the motion they said it was so--after June, after the jurisdictional
23 hearing they asked him to be removed back to regular single cell

1 detention or Camp Four.

2 If you go through her affidavit and you go through the
3 underlying documents that she purports, it becomes very clear that
4 Mr. Hamdan was fine in April when he was also in single cell
5 detention; he was fine in May; he was fine after the June hearing.
6 There were no issues whatsoever with regards to any problem that Mr.
7 Hamdan had until----

8 MJ [CAPT ALLRED]: Are we in 2008 now?

9 TC [LCDR STONE]: No, we are getting to 2008. Until December of
10 2007. And I would ask you to compare those documents, which is the
11 Emily Keram declaration that says on page 28, on paragraph 48, that
12 Hamdan should participate completely, actively, thoroughly in his
13 defense that is supported by Ms. Prasow's declaration where she
14 doesn't mention, and her documents that support it, no mental health
15 issues or concerns with their requests to move Mr. Hamdan to Camp
16 Four at all, until December of 2007, which Emily Keram says is the
17 time in which Hamdan then started to feel that his case might be
18 hopeless, that there might be problems, and that he might not want to
19 participate. We all know what happened in December of 2007: There
20 were witnesses called, evidence put forth, and now Hamdan has a
21 problem.

22 The government's position I think is well stated. There's
23 absolutely no reason to grant this motion. Confinement is

1 appropriate in the manner that it is. And, deference should be
2 provided to the Joint Task Force Guantanamo, who has been doing and
3 acting in accordance with the laws of the United States of America.

4 Thank you, sir.

5 MJ [CAPT ALLRED]: Just a moment.

6 TC [LCDR STONE]: Sure.

7 MJ [CAPT ALLRED]: Is it the government's position then that you
8 can hold someone for seven years while awaiting trial, and that he is
9 not entitled to any credit against any sentence that might be imposed
10 for those seven years of detention?

11 TC [LCDR STONE]: He is an enemy combatant. And as an enemy
12 combatant, according to the laws of war, he can be held for the
13 duration of the hostilities.

14 MJ [CAPT ALLRED]: That's your position?

15 TC [LCDR STONE]: Yes, sir.

16 MJ [CAPT ALLRED]: Okay. The only evidence you submitted on
17 this motion is an affidavit that's dated 19 February 2008.

18 TC [LCDR STONE]: Well, there are actually two of those. And
19 then there's the detention record that shows his movement and his
20 acting up for his movement at Camp Four.

21 MJ [CAPT ALLRED]: Okay. Well, I haven't seen--there are two of
22 what? Two affidavits.

23

1 TC [LCDR STONE]: There are two affidavits that were attached to
2 the government's filing. There's one from Dr. Manelli and there's
3 one from----

4 MJ [CAPT ALLRED]: Are they both dated 19 February?

5 TC [LCDR STONE]: Yes, sir.

6 MJ [CAPT ALLRED]: Okay.

7 TC [LCDR STONE]: And then there's the document that we handed
8 the court reporter that talked about the Camp Four movement that you
9 will see.

10 MJ [CAPT ALLRED]: Oh, the guard report?

11 TC [LCDR STONE]: Yes, sir.

12 MJ [CAPT ALLRED]: Okay.

13 TC [LCDR STONE]: And then, quite frankly, sir, everything else
14 comes from what the government submitted.

15 MJ [CAPT ALLRED]: Okay. Well, here's what I would like from
16 the government.

17 TC [LCDR STONE]: Sure.

18 MJ [CAPT ALLRED]: I would like an updated affidavit. You
19 haven't chosen to bring Colonel Vargo in to testify. But if he is
20 still the camp commander or JTF commander or whatever, I would like
21 to know from Colonel Vargo a description of the accused's current
22 conditions of confinement. I mean, as brilliant as I am, I am
23 confused about what camp he's in and how they treat him there. And

1 the kind of detail in the existing affidavit is what I'm looking for:
2 How often he gets recreation, how often he leaves the camp, how many
3 other people are in that block or cell or whatever with him, how many
4 people he can communicate with on a day-to-day basis who speak his
5 language, that kind of thing.

6 TC [LCDR STONE]: Okay.

7 MJ [CAPT ALLRED]: I would like to see his disciplinary history
8 since 19 February 2008, and to know whether it's things like excess
9 salt packets or something more substantial. And then I would like
10 either Colonel Vargo or his relief to describe what the next logical
11 step would be if improved conditions were warranted either by his
12 conduct or if I were to order it. Okay?

13 TC [LCDR STONE]: As if he were to leave?

14 MJ [CAPT ALLRED]: I mean apparently there's a hierarchy of
15 camps.

16 TC [LCDR STONE]: Sure.

17 MJ [CAPT ALLRED]: Some are for the really bad, and Camp Four is
18 where the totally compliant stay. I don't know where he is in that
19 hierarchy and what's next. And even if he doesn't move to a new
20 camp, whether they can accommodate exercise hours after he returns
21 from court, whether they can give him two library books instead of
22 one. I mean, some of those things that would be responsive to Dr.
23 Keram's suggestions that improvement in his conditions would improve

1 his mental health. Okay?

2 With respect to the rest, I can read the law and figure it
3 out perhaps myself. But I feel like there's a dearth of evidence
4 from both sides, actually, because I don't fully understand the
5 conditions or where he is or why he's there. Mr. Hamdan's testimony
6 was a little hard to follow. It was not chronological, perhaps. And
7 so I would ask both sides to supplement their filings with that
8 additional evidence.

9 This says SECRET, but it's been crossed out and initialed.
10 So I assume it's not a classified document any longer?

11 TC [LCDR STONE]: That's correct.

12 MJ [CAPT ALLRED]: Excellent. Okay. Thank you very much.

13 DC [LCDR MIZER]: Your Honor, I told you that we were going to
14 get you all of Mr. Hamdan's disciplinary record. And when we do
15 that, I would invite the court's attention to an entry on March 30,
16 2006, where the record reflects that Mr. Hamdan is being
17 reconsolidated with pre-commission detainees. It's that entry that
18 we believe violated the district court's order. And we will leave
19 that to your determination once we get you the records to review
20 yourself, Your Honor.

21 MJ [CAPT ALLRED]: Well, I suppose the government's answer would
22 be that if some misconduct precipitated that reconsolidation, it
23 would be compliant. So when was he released in compliance with the

1 order? From January to March he was out?

2 TC [LCDR STONE]: Your Honor, he was ordered to be released
3 November 8, 2004. And that order was still in effect until the
4 M.C.A., Your Honor. So on March 30, 2006, his disciplinary record
5 reflects that he was moved and reconsolidated with pre-commission
6 detainees not for any disciplinary infraction. That's the only point
7 that I sought to make.

8 MJ [CAPT ALLRED]: So for 15 months, the government complied
9 with the district court's order. And then, for some unknown reason,
10 moved him back.

11 TC [LCDR STONE]: Actually, sir, the next month it says: After
12 the defense notified JTF-GTMO, he was then put back out of the pre-
13 commission wing. So somebody moved him. They put him there. He was
14 notified, no, district court order is still in effect, and he was
15 then moved out away from the pre-commission wing. We will deal with
16 that issue as well.

17 MJ [CAPT ALLRED]: Very good. It's 11:15. Actually, Mr. Swift,
18 I think this might be a good time for us to have our discussion about
19 your client's wishes with respect to prayer, Because I want to be
20 respectful of his faith and his preferences. But----

21 CDC [MR. SWIFT]: Yes, Your Honor. My client has indicated to
22 me that he very much desires to have the noonday prayer, which occurs
23 here as the time difference between 1:00 and 1:30. And my suggested

1 time period, because there's also that it does allow it over lunch
2 period, but Mr. Hamdan needs to get lunch. It's a 12:30 to 2:00
3 prayer, an hour and a half break, and then a little longer with a
4 normal lunch break because it provides half an hour during that lunch
5 break for prayer time.

6 MJ [CAPT ALLRED]: Okay.

7 CDC [MR. SWIFT]: And Mr. Hamdan has indicated that part of that
8 regular hour, and that we're on now. And I have not yet been able to
9 check with him about earlier stops by our normal hours. He has no
10 other desire for prayer outside of that.

11 MJ [CAPT ALLRED]: So it looks like I think we will be able to
12 adopt a daily schedule of 8:30 or 9:00 starts in the morning, 12:30
13 to 2:00 breaks to accommodate everyone's interest in lunch and
14 recreation and prayer, and then maybe 5:00 in the afternoon we should
15 be able to wrap it up for each day.

16 Okay. So it's 11:15. The government has some witnesses to
17 call on the conditions of interrogation?

18 CTC [MR. MURPHY]: We do, Your Honor. And if I may be excused,
19 I have the witnesses segregated and can bring them down.

20 MJ [CAPT ALLRED]: You may.

21 While he is out of the courtroom, I'm looking at the
22 disciplinary history. Is refusing a meal an infraction in the camp?
23 Refusing a shower?

1 DC [LCDR MIZER]: It's not in the disciplinary record, Your
2 Honor, so I don't believe that it would be.

3 MJ [CAPT ALLRED]: This is the detainee history.

4 TC [LCDR STONE]: That's not the--refusing a shower is not a
5 disciplinary infraction. That is a detainee history of what entries
6 were made with regards to him. If he refuses it, it's logged.
7 There's no disciplinary action taken about it. If something happens
8 with him that might be discipline related, which is what you have, I
9 think there's four entries and rough times of this ongoing
10 discipline.

11 TC [LCDR STONE]: And we will provide the court with his
12 disciplinary record.

13 MJ [CAPT ALLRED]: Is there an instruction over there that says
14 for this kind of infraction, like telling the guard to shut up, this
15 is the range of approved punishments?

16 DC [LCDR MIZER]: Sir, I think you are looking at the wrong Navy
17 uniform for that question. I think that's a question----

18 MJ [CAPT ALLRED]: We need somebody from the Air Force.

19 DC [LCDR MIZER]: No. I think from the government, Your Honor.

20 MJ [CAPT ALLRED]: The government.

21 TC [LCDR STONE]: This is a disciplinary range and
22 documentation. There is a manual that they follow with regards to
23 discipline.

1 DC [LCDR MIZER]: And, Your Honor, I would point out again.
2 We're going to deal with the discovery issue hopefully tomorrow. But
3 that would be one of the SOPs that we've tried to get our hands on
4 but the government hasn't given to us.

5 MJ [CAPT ALLRED]: Okay.

6 **[The witness entered the courtroom.]**

7 Good morning. Why don't you come stand up here by
8 the--come stand up here by the witness box, if you would, and you can
9 be sworn?

10 CTC [MR. MURPHY]: Agent [REDACTED], if you could raise your
11 right hand while I swear you.

12 [REDACTED], Civilian, was called as a witness for the
13 prosecution, was sworn and testified as follows:

14 CTC [MR. MURPHY]: Please be seated.

15 **[The witness did as directed.]**

16 **DIRECT EXAMINATION**

17 **Question by the trial counsel:**

18 Q [MR. MURPHY]: Who are you employed by, and what are your
19 duties?

20 A [MR. [REDACTED]]: Currently I'm employed by the Federal Bureau
21 of Investigation. And I was employed as a special agent,
22 investigator in the New York Office from 1997 through 2005.

23

1 Q [MR. MURPHY]: Please describe to the Commission your formal
2 education and your law enforcement credentials.

3 MJ [CAPT ALLRED]: I'm sorry; I missed the witness's name.

4 CTC [MR. MURPHY]: I'm sorry; I should have asked that right
5 from the beginning.

6 Q [MR. MURPHY]: Could you state your full name and spell your
7 last name for the record?

8 A [MR. [REDACTED]]: Sure. It's [REDACTED]. It's
9 spelled [REDACTED].

10 Q [MR. MURPHY]: Could you describe for the commission your
11 formal education and your law enforcement training?

12 A [MR. [REDACTED]]: My formal education is I received a Bachelor
13 of Science from the University of Pittsburgh in 1992, and have been
14 employed with the FBI since 1997 after I received training at
15 Quantico, Virginia and various assignments in counterterrorism
16 training.

17 Q [MR. MURPHY]: Do you have any specialized law enforcement
18 training?

19 A [MR. [REDACTED]]: The area of counterterrorism. Yes.

20 Q [MR. MURPHY]: And could you tell us a little bit about that?

21 A [MR. [REDACTED]]: I was assigned to our New York Joint
22 Terrorism Task Force, taking various courses or participating in
23 various courses of basic counterterrorism training at Quantico and

1 New York City, and also Cairo, Egypt between the years of 1997 and
2 2005.

3 Q [MR. MURPHY]: Did you receive an assignment to interview
4 Salim Hamdan, also known as Saqr al Jadawi?

5 A [MR. [REDACTED]]: Yes.

6 Q [MR. MURPHY]: When did you get this assignment?

7 A [MR. [REDACTED]]: I received this assignment in January of
8 2002.

9 Q [MR. MURPHY]: Did you in fact interview him, in person, with
10 others?

11 A [MR. [REDACTED]]: Yes.

12 Q [MR. MURPHY]: Do you recognize Salim Hamdan in the courtroom
13 today?

14 A [MR. [REDACTED]]: I do.

15 Q [MR. MURPHY]: If you could, point to him and identify an
16 article of clothing he's wearing.

17 A [MR. [REDACTED]]: Sure. Mr. Hamdan has the white headscarf
18 on.

19 CTC [MR. MURPHY]: May the record reflect that the witness has
20 correctly identified the accused in this case.

21 Q [MR. MURPHY]: During what period, time period did you
22 interview the accused?

23 A [MR. [REDACTED]]: I interviewed him on January 31--correction,

1 January 31, 2002 through February 1st and 3rd, 2002.

2 Q [MR. MURPHY]: Where did you interview him?

3 A [MR. [REDACTED]]: Kandahar Airfield in Afghanistan.

4 Q [MR. MURPHY]: Approximately, how many times did you interview
5 Salim Hamdan?

6 A [MR. [REDACTED]]: Three to four times in Kandahar.

7 Q [MR. MURPHY]: Could you describe in some detail the room or
8 the rooms where these interviews took place.

9 A [MR. [REDACTED]]: We had a series of six tents, smaller tents
10 outside the detention facility in Kandahar, a series of small tents
11 that contained a light that hung from the ceiling, supported by a
12 pole, usually a series of three to four chairs in the room, and a
13 table in between the people we interviewed and myself and the
14 translators.

15 Q [MR. MURPHY]: Were there other people in the interview room
16 or rooms with you?

17 A [MR. [REDACTED]]: Yes.

18 Q [MR. MURPHY]: And who were they?

19 A [MR. [REDACTED]]: On the occasions where I spoke to Mr.
20 Hamdan, it was [REDACTED]; he was a CID special agent. On
21 another occasion it was [REDACTED]; he was also a CID special
22 agent, as well as a translator from the 202 Military Intelligence
23 Battalion.

1 Q [MR. MURPHY]: In what language were the interviews conducted?

2 A [MR. [REDACTED]]: Arabic.

3 Q [MR. MURPHY]: And did everyone in the interview room speak
4 Arabic?

5 A [MR. [REDACTED]]: No, they did not.

6 Q [MR. MURPHY]: Was there a translation process for those in
7 the room who did not understand Arabic?

8 A [MR. [REDACTED]]: Yes. Correct.

9 Q [MR. MURPHY]: Can you describe that translation process for
10 us?

11 A [MR. [REDACTED]]: We would pose our questions to the
12 translator in the tent with us. His name was [REDACTED], I
13 believe. He was a staff sergeant. And he would relay the questions
14 to Mr. Hamdan. And when he provided a response, it came back through
15 Sergeant [REDACTED] back to us.

16 Q [MR. MURPHY]: Using this process, were you able to understand
17 everything that Salim Hamdan said during the interviews?

18 A [MR. [REDACTED]]: It sometimes took a number of attempts or
19 just some back and forth until we got--the questions were clear.
20 But, yes, ultimately we understood everything that we received back.

21 Q [MR. MURPHY]: What were the seating arrangements in the
22 interview rooms?

23 A [MR. [REDACTED]]: Mr. Hamdan would sit in a metal chair across

1 from a table from us, there was a wooden table. And I was
2 accompanied on my side with one of the CID special agents and the
3 translator. But he was usually close enough where he could shake
4 hands.

5 Q [MR. MURPHY]: Exactly how close, or approximately how close
6 were you and the other investigators physically to the accused during
7 these interviews?

8 A [MR. [REDACTED]]: Three or four feet.

9 Q [MR. MURPHY]: How would you describe the tone of the
10 interviews with Mr. Hamdan?

11 A [MR. [REDACTED]]: Cordial, receptive to see him. We asked him
12 if he needed anything in the beginning or if he would like to take
13 his time or if he would like anything to drink before we started. We
14 took a number of breaks.

15 Q [MR. MURPHY]: I'm going to ask you if you would define the
16 phrase "open-ended questions" for me.

17 A [MR. [REDACTED]]: Sure.

18 Q [MR. MURPHY]: How would you define that?

19 A [MR. [REDACTED]]: Questions posed to Mr. Hamdan were: What
20 did you think at this time? Or, who else would you--could you tell
21 us that you may have met during the situations? Or, what else did
22 you see that you could relate to us that might help enlighten or
23 better address this question?

1 Q [MR. MURPHY]: Did you in fact ask the accused what you've
2 described as open-ended questions during your interviews?

3 A [MR. [REDACTED]]: Yes.

4 Q [MR. MURPHY]: Did you or anyone else during the interviews
5 ever yell at Mr. Hamdan or act in any manner that you would consider
6 to be threatening?

7 A [MR. [REDACTED]]: No.

8 Q [MR. MURPHY]: At any time during these interviews--during
9 these interviews, did the accused ever tell you that he was abused or
10 mistreated or tortured by anyone at any time?

11 A [MR. [REDACTED]]: The only thing he mentioned was he had had
12 shoulder pain from maybe some of his walks down from the inside of
13 the compound back into the tents where we interviewed him.

14 Q [MR. MURPHY]: Did he describe that pain as a result of abuse,
15 mistreatment, or torture by anyone?

16 A [MR. [REDACTED]]: He described it as perhaps when he was
17 brought down to the tent, they lifted up his arms a little bit more
18 than normal or brought him down into the tent. That's the one thing
19 he complained about when we spoke with him.

20 Q [MR. MURPHY]: All right. Now, you actually saw how the
21 detainees were moved. Right?

22 A [MR. [REDACTED]]: Yes.

23

1 Q [MR. MURPHY]: Since we're getting into that now, why don't
2 you just describe very specifically what you saw regarding the
3 physical transfer by the guards?

4 A [MR. [REDACTED]]: What we saw is when we were in tents, myself
5 and the CID investigators and the translators, we would see the MPs
6 bring Mr. Hamdan and the other detainees down a small trail that was
7 a little bit--it wasn't an even path. There was some bumps and dips
8 in it. And when they escorted him down, I believe he may have been
9 at times cuffed in the back or restrained in the back. And they had
10 to lift him up to assist him down. And I think it may have been
11 through times like that. I didn't see what happened in the camp.
12 The only thing I can attribute it to was when they had brought him
13 down.

14 Q [MR. MURPHY]: Was what you observed in the way they moved Mr.
15 Hamdan consistent with the way you saw other detainees moved?

16 A [MR. [REDACTED]]: Yes.

17 Q [MR. MURPHY]: As you observed that, did you see activity in
18 any way that could be considered abuse, mistreatment, or torture?

19 A [MR. [REDACTED]]: No.

20 Q [MR. MURPHY]: What would you have done if the accused or
21 anyone, any other detainee, for that matter, made any report to you
22 of abuse, mistreatment, or torture?

23 A [MR. [REDACTED]]: We had immediate access to the

1 noncommissioned officers that oversaw the MPs, and we saw regular
2 access with the captains and the commanders of the MP battalion.

3 Q [MR. MURPHY]: Did you have an opportunity to observe the
4 accused's detention facility and the guards working at that detention
5 facility?

6 A [MR. [REDACTED]]: I didn't have the opportunity to observe
7 anything inside. Just when the military policemen came outside the
8 compound.

9 Q [MR. MURPHY]: Did you ever observe or hear any reports about
10 the guards abusing this accused or any other detainee at this
11 facility?

12 A [MR. [REDACTED]]: No.

13 Q [MR. MURPHY]: Did Salim Hamdan ever tell you that he was
14 forced to speak against his will to anyone, or that he made up false
15 information just to please an interviewer, or that he made up false
16 information for any reason?

17 A [MR. [REDACTED]]: No. Not to us or anyone.

18 Q [MR. MURPHY]: Did you provide the accused with opportunities
19 to eat and drink food and liquids during the interviews?

20 A [MR. [REDACTED]]: Yes, we did.

21 Q [MR. MURPHY]: Did Salim Hamdan indicate a willingness to talk
22 to you?

23 A [MR. [REDACTED]]: He did.

1 Q [MR. MURPHY]: How did he express that willingness?

2 A [MR. [REDACTED]]: We would ask him if he would care to talk to
3 us that day, if he needed to take a break, or we could start at a
4 later time. And he would raise his hand and say, now, it's not a
5 problem, we can start.

6 Q [MR. MURPHY]: Did you provide rights forms to Salim Hamdan
7 before the interviews, such as: Article 31 warnings under the
8 Uniform Code of Military Justice, constitutional rights, or Miranda
9 or Miranda-type warnings?

10 A [MR. [REDACTED]]: We did not.

11 Q [MR. MURPHY]: And why is that?

12 A [MR. [REDACTED]]: Guidance we were given at the time to not
13 provide those rights.

14 Q [MR. MURPHY]: Was it clear to you that the accused was free
15 to speak with you or not speak with you during the course of your
16 interviews with him?

17 A [MR. [REDACTED]]: That's correct. If he said, "I don't want
18 to speak with you today," we would just stop the interview and allow
19 him to be taken back inside the facility.

20 Q [MR. MURPHY]: And what you just said is how it was made clear
21 to you. Is that right?

22 A [MR. [REDACTED]]: Correct.

23

1 Q [MR. MURPHY]: Approximately how long of a time did the
2 interviews last?

3 A [MR. [REDACTED]]: Four hours, at the longest.

4 Q [MR. MURPHY]: Was it important to you, as a federal law
5 enforcement special agent, that the information Salim Hamdan provided
6 to you was both reliable and accurate?

7 A [MR. [REDACTED]]: Correct.

8 Q [MR. MURPHY]: Why was that?

9 A [MR. [REDACTED]]: Well, we wanted to take our time to go ahead
10 and hear everything that he had to say, and then we could use that
11 information as a basis for a further identification or identifying
12 other people.

13 Q [MR. MURPHY]: Can you explain to us what an FBI Form 302 is?

14 A [MR. [REDACTED]]: It's a formal record of our interviews.

15 Q [MR. MURPHY]: And what's the purpose of this form?

16 A [MR. [REDACTED]]: They're used for entry into court.

17 Q [MR. MURPHY]: Were these reports, 302s, prepared to generally
18 summarize your interviews with the accused?

19 A [MR. [REDACTED]]: I'm sorry.

20 Q [MR. MURPHY]: Were these reports prepared that generally--or,
21 to generally summarize your interviews with the accused?

22 A [MR. [REDACTED]]: Yes.

23

1 Q [MR. MURPHY]: And tell us mechanically how these reports are
2 prepared.

3 A [MR. [REDACTED]]: After our interviews are conducted, we had a
4 small office in the airport itself where we had a laptop computer
5 where, after the days were completed, we would go ahead and compile
6 the results of those interviews. So over a series of four or five
7 days, during and shortly after the interviews, our 302 was prepared.

8 Q [MR. MURPHY]: All right. And have you reviewed these reports
9 in preparation for your testimony today?

10 A [MR. [REDACTED]]: Yes, I have.

11 Q [MR. MURPHY]: I'd like to ask you some questions now about
12 certain allegations that Mr. Hamdan raised generally about
13 interrogations generally during his testimony.

14 Did you or do you know of anyone that took away personal
15 belongings of the accused to have any effect on your interviews with
16 him?

17 A [MR. [REDACTED]]: No.

18 Q [MR. MURPHY]: Did you or anyone you know ever condition
19 medical care he was to receive based on the success or lack of
20 success or any aspect of interviews?

21 A [MR. [REDACTED]]: No.

22

23

1 Q [MR. MURPHY]: Did any investigator, and did Mr. Hamdan report
2 to you that any investigator, male or female, ever abuse him in any
3 manner?

4 A [MR. [REDACTED]]: No. Other than the shoulder pain, that was
5 the only incident we discussed.

6 Q [MR. MURPHY]: All right. And you observed that, and it was
7 not reported to you as an example of abuse, mistreatment, or torture?

8 A [MR. [REDACTED]]: Correct.

9 Q [MR. MURPHY]: Did Mr. Hamdan--or, did you, or anyone you know
10 of, ever order Mr. Hamdan into solitary confinement to facilitate the
11 interview process?

12 A [MR. [REDACTED]]: No.

13 Q [MR. MURPHY]: Did Mr. Hamdan report to you any incident in
14 Bagram where individuals are alleged to have put their knee in the
15 back of his shoulder or in back--their knee in his knee--soldier's
16 knee in his back, or any other abuse at Bagram?

17 A [MR. [REDACTED]]: No. I wasn't even aware that he was at
18 Bagram at the time we'd interviewed him.

19 MJ [CAPT ALLRED]: I'm sorry, what was the answer?

20 A [MR. [REDACTED]]: I wasn't even aware that he had been at
21 Bagram, during the time I'd interviewed him.

22 Q [MR. MURPHY]: And he never mentioned that?

23 A [MR. [REDACTED]]: No.

1 Q [MR. MURPHY]: And specific to you, and also this will be
2 specific to Agent [REDACTED] when he testifies, did you or anyone you
3 know of ever threaten to kill Salim Hamdan?

4 A [MR. [REDACTED]]: No.

5 Q [MR. MURPHY]: Did anyone put a gun in front of him to
6 intimidate or threaten him in any manner?

7 A [MR. [REDACTED]]: No.

8 Q [MR. MURPHY]: All right. Did the accused during your
9 interviews ever report to you seeing Afghani local forces kill an
10 Arab; and then, because of that, he felt threatened by U.S. forces
11 and special agents?

12 A [MR. [REDACTED]]: No. He never reported anybody being killed.

13 Q [MR. MURPHY]: Did Mr. Hamdan report to you that because
14 someone put a hood over his head, that caused him to believe that he
15 would be killed?

16 A [MR. [REDACTED]]: Not that I recall.

17 Q [MR. MURPHY]: Did Mr. Hamdan report to you that a detainee
18 was beaten to death in Bagram; and, that as a result, his survival
19 depended on cooperating with the U.S. officials?

20 A [MR. [REDACTED]]: No.

21 [END OF PAGE]

1 Q [MR. MURPHY]: Did Mr. Hamdan report to you seeing detainees
2 beaten and left lying on a tarmac, anywhere, in extreme cold weather;
3 and that that caused him, Mr. Hamdan, and other detainees to be at
4 the mercy of U.S. agents?

5 A [MR. [REDACTED]]: No.

6 Q [MR. MURPHY]: Let's talk specifically about some of the
7 allegations in the file that relate to Kandahar.

8 Did the accused report to you about being in a duck march,
9 D-U-C-K, march position?

10 A [MR. [REDACTED]]: I've never heard it described like that. I
11 was never described of a duck march position. Just how they brought
12 him out from camp was my only indication of how he may have been
13 bound when he came to us.

14 Q [MR. MURPHY]: All right. And your testimony is you saw that
15 person?

16 A [MR. [REDACTED]]: Yes.

17 Q [MR. MURPHY]: You didn't view that as abuse of any kind?

18 A [MR. [REDACTED]]: No. Everybody was detained--or, everybody
19 was restrained the same way.

20 [END OF PAGE]

21

22

23

1 Q [MR. MURPHY]: Now, this is in the filings, but there's no
2 testimony by anyone that's in the filings, defense filings. Did you
3 hear or learn anything about Mr. Hamdan being rammed by the head into
4 a post as he walked toward the interrogation?

5 A [MR. ██████████]: I had never seen anything like that.

6 Q [MR. MURPHY]: And that, because his head was rammed into a
7 post repeatedly, so the allegation goes, he learned the word "again,"
8 because someone was doing that over him?

9 A [MR. ██████████]: I wasn't aware of that.

10 Q [MR. MURPHY]: Heard nothing of that?

11 A [MR. ██████████]: No.

12 Q [MR. MURPHY]: We've heard nothing of that. Did Mr. Hamdan
13 tell you that the guards in Kandahar said that he would be killed?

14 A [MR. ██████████]: I never heard of that, either.

15 Q [MR. MURPHY]: Did Mr. Hamdan say anything about being forced
16 to sit motionless on benches with other prisoners for days?

17 A [MR. ██████████]: No.

18 Q [MR. MURPHY]: Did he say anything about being beaten and
19 kicked, threatened with death and torture, or being sexually
20 humiliated, while walking towards interrogations?

21 A [MR. ██████████]: No.

22

23

1 Q [MR. MURPHY]: All right. Can you provide us with a brief
2 summary of the key admissions made by Salim Hamdan to you during your
3 interviews with him?

4 A [MR. [REDACTED]]: Sure. We--there was several hundred
5 detainees at Kandahar Air Field at the time, and he was of interest
6 to us because he was described of being Osama bin Laden's driver. So
7 that drew our immediate attention, and when we interviewed him. We
8 discussed his recruitment, how he got to Afghanistan, his time in Al
9 Farouq, his participation in the convoy with Osama bin Laden when
10 they made movements from Kandahar to Kabul, as well as seeing Abu
11 Hafs' body and recovering that after his death in late 2001.

12 Q [MR. MURPHY]: All right. Did you at trial provide even
13 greater detail than you did just now about specific admissions that
14 the accused made during your interviews with him?

15 A [MR. [REDACTED]]: Again?

16 Q [MR. MURPHY]: In order to corroborate part of the admissions
17 the accused made to you, did you show the accused a series of
18 photographs, and ask him if he could identify the photo and explain
19 what he knew about the person?

20 A [MR. [REDACTED]]: Yes.

21 CTC [MR. MURPHY]: Your Honor, I would ask that for the military
22 judge I would display what is an unclassified photograph. It is
23 listed as Bates stamped 3992, and the government would ask that it

1 now be marked as Appellate Exhibit 253.

2 MJ [CAPT ALLRED]: May I see it? You want to display that to
3 everyone?

4 CTC [MR. MURPHY]: Yes. After the military judge has seen it,
5 it would be my next request that it be displayed to the witness and
6 to all parties. It is unclassified.

7 MJ [CAPT ALLRED]: Please do. Appellate Exhibit 254 will be the
8 number assigned to this paragraph.

9 CTC [MR. MURPHY]: 254.

10 MJ [CAPT ALLRED]: Yes.

11 **[APPELLATE EXHIBIT 254.]**

12 Q [MR. MURPHY]: All right. Do you recognize this photo?

13 A [MR. [REDACTED]]: Yes.

14 Q [MR. MURPHY]: Was this one of the photos you showed to the
15 accused?

16 A [MR. [REDACTED]]: Yes, it was.

17 Q [MR. MURPHY]: Did he correctly identify the person in the
18 picture?

19 A [MR. [REDACTED]]: He did.

20 Q [MR. MURPHY]: And what did he say about it?

21 A [MR. [REDACTED]]: The guy's name is Abu Hafs Al-Masri. That
22 he was killed in an air strike or through an air strike in November
23 of 2001, and that he was sent to help recover his body; and when he

1 had found it, he had seen that his body was--didn't receive much
2 damage, and he thought that he may have died peaceful. Or at least
3 it wasn't a violent death or that it didn't appear to be a violent
4 death; and that he recovered the bodies of 15 other people as well,
5 and he participated in the burial ceremonies afterwards.

6 Q [MR. MURPHY]: Did this identification of this Exhibit 254
7 provide you the independent corroboration of at least part of the
8 admissions Salim Hamdan made to you?

9 A [MR. [REDACTED]]: It did.

10 CTC [MR. MURPHY]: If I may have just a moment.

11 Your Honor, we would tender the witness.

12 MJ [CAPT ALLRED]: Very good. Please go ahead.

13 **CROSS-EXAMINATION**

14 **Question by the defense counsel:**

15 Q [MR. SCHNEIDER]: Good morning, sir.

16 A [MR. [REDACTED]]: Good morning. How are you?

17 Q [MR. SCHNEIDER]: My name is Harry Schneider. I'm one of the
18 attorneys for Salim Hamdan.

19 A [MR. [REDACTED]]: Okay.

20 Q [MR. SCHNEIDER]: Is it okay if I finish this up rather
21 quickly?

22 A [MR. [REDACTED]]: No. No problem.

23

1 Q [MR. SCHNEIDER]: What can you tell us about how Mr. Hamdan
2 was treated before January 30, 2002?

3 A [MR. [REDACTED]]: I didn't really know how much about how he
4 was treated, other than he was kept inside the facility with hundreds
5 of other--or at least up to several hundred others inside the
6 facility itself.

7 Q [MR. SCHNEIDER]: What personal knowledge do you have of how
8 he was treated, interrogated, perhaps mistreated? Do you have any
9 personal knowledge?

10 A [MR. [REDACTED]]: None.

11 Q [MR. SCHNEIDER]: Let's move from before January 30, 2002 to
12 after February 1, 2002. What personal knowledge do you have from
13 your own observations what the witness as--to how he was treated
14 after that date?

15 A [MR. [REDACTED]]: After February 3rd?

16 Q [MR. SCHNEIDER]: After February 1st, 2002.

17 A [MR. [REDACTED]]: Other than the short times we had with him,
18 I don't know anything about the allegations afterwards or before.

19 Q [MR. SCHNEIDER]: And what was the significance of the
20 photograph with regard to how Mr. Hamdan was treated?

21 A [MR. [REDACTED]]: There is none. Correlation.

1 Q [MR. SCHNEIDER]: Did you watch Mr. Hamdan's testimony
2 yesterday?

3 A [MR. [REDACTED]]: I did not.

4 Q [MR. SCHNEIDER]: A couple of other questions. Did you say
5 that you interrogated him in Kandahar on January 31st through the 1st
6 of February?

7 A [MR. [REDACTED]]: January 31st, 1st and 3rd of February.

8 Q [MR. SCHNEIDER]: And you have reviewed the report?

9 A [MR. [REDACTED]]: Yes.

10 Q [MR. SCHNEIDER]: Did you notice that the report indicates
11 that the investigation occurred on January 30th, and that it was
12 transcribed on the 31st?

13 A [MR. [REDACTED]]: I did.

14 Q [MR. SCHNEIDER]: And it would be impossible, of course, to
15 transcribe the interviews on the 1st and 3rd if you transcribed it on
16 the 31st?

17 A [MR. [REDACTED]]: It's just the date that's locked in on the
18 computer when you start it.

19 Q [MR. SCHNEIDER]: So it's erroneous on the report?

20 A [MR. [REDACTED]]: No. It's just when it's started. And we
21 don't change that to reflect it. It just continues on.

22 Q [MR. SCHNEIDER]: Okay. So you did transcribe it on the 31st?

23 A [MR. [REDACTED]]: Start on it on the 30th, and worked on it on

1 the 31st, 1st and the 3rd.

2 Q [MR. SCHNEIDER]: Okay. Is there anything of interest that
3 didn't make it into your report, that you recall, as you read it?

4 A [MR. [REDACTED]]: Not that I recall.

5 Q [MR. SCHNEIDER]: The report is about nine pages
6 single-spaced, and ends about--as far as the facts in the report, it
7 ends as of apprehension?

8 A [MR. [REDACTED]]: Correct.

9 Q [MR. SCHNEIDER]: In fact, the last sentence is: Hamdan was
10 held for six or seven days before the internment was commenced?

11 A [MR. [REDACTED]]: That's what he told us. Correct.

12 Q [MR. SCHNEIDER]: Let me just test your recollection here.

13 A [MR. [REDACTED]]: Sure.

14 Q [MR. SCHNEIDER]: I know you answered the question generally.
15 But what can you tell us, sir, about what happened to Mr. Hamdan
16 during those four or six to seven days before he was turned over to
17 the Americans?

18 A [MR. [REDACTED]]: I don't know anything other than what he
19 described to us what he was treated in that period of time.

20 Q [MR. SCHNEIDER]: Fair enough. Would you agree that there are
21 certain standard, routine policy, procedures that govern the way you
22 do your job, generally speaking?

23 A [MR. [REDACTED]]: Generally speaking.

1 Q [MR. SCHNEIDER]: Does that include the way in which you
2 conduct an interrogation?

3 A [MR. [REDACTED]]: Generally.

4 Q [MR. SCHNEIDER]: Generally speaking. And specifically, does
5 that typically involve giving a rights advisement?

6 A [MR. [REDACTED]]: Not----

7 Q [MR. SCHNEIDER]: I'm sorry. It sounds like I'm finished;
8 perhaps many wish I was, but I'm really just slowing down so I don't
9 get this trouble with the translator.

10 Does that typically include a rights advisement for anyone
11 who is the subject or suspect in an ongoing investigation where you
12 believe a crime was committed?

13 A [MR. [REDACTED]]: That is correct.

14 Q [MR. SCHNEIDER]: Now, was Mr. Hamdan, in your view, a suspect
15 in the ongoing investigation of a crime being interrogated?

16 A [MR. [REDACTED]]: No.

17 Q [MR. SCHNEIDER]: Why not?

18 A [MR. [REDACTED]]: There was a general allegation that he was
19 Osama bin Laden's driver. Didn't have any advanced knowledge of that
20 beforehand. So I wanted to speak with him to see what he had to say
21 over the series of three or four days.

22

23

1 Q [MR. SCHNEIDER]: Fair enough. In your view, in your personal
2 view at the time, driving bin Laden was a crime?

3 A [MR. [REDACTED]]: I wasn't sure if it was credible or not or
4 who made that association before I talked to him.

5 Q [MR. SCHNEIDER]: If you will forgive me, I'm flipping through
6 the pages about events before January 30th and after February 3rd.

7 A [MR. [REDACTED]]: Sure.

8 Q [MR. SCHNEIDER]: Have you ever read any other reports of
9 interrogations besides your own with regard to Mr. Hamdan?

10 A [MR. [REDACTED]]: I have.

11 Q [MR. SCHNEIDER]: Would you agree with me that there were a
12 number of interrogations, perhaps as many as 21?

13 A [MR. [REDACTED]]: I didn't know it was that many.

14 Q [MR. SCHNEIDER]: Were you aware that some 21 FBI personnel
15 interviewed him?

16 A [MR. [REDACTED]]: Not that many.

17 Q [MR. SCHNEIDER]: Were you aware that 19 non-FBI people
18 interviewed him?

19 A [MR. [REDACTED]]: Not that high of a number. No.

20 Q [MR. SCHNEIDER]: The last question.

21 MJ [CAPT ALLRED]: I'm sorry, were those interviews during the
22 visit to Kandahar, or the whole in total?

23 CDC [MR. SCHNEIDER]: Throughout.

1 MJ [CAPT ALLRED]: Okay.

2 Q [MR. SCHNEIDER]: The last question. Based on your knowledge,
3 experience, and training, and what you know of Mr. Hamdan--I don't
4 want to know any names. But do you know whether he was ever
5 interviewed or interrogated by anyone who did not create a report?

6 A [MR. [REDACTED]]: Did not create a report?

7 Q [MR. SCHNEIDER]: Right.

8 A [MR. [REDACTED]]: Not that I'm aware of.

9 CDC [MR. SCHNEIDER]: Thank you.

10 CTC [MR. MURPHY]: The government has no further questions, Your
11 Honor.

12 MJ [CAPT ALLRED]: Thank you, Special Agent [REDACTED]. Thank
13 you for your testimony. You can withdraw from the courtroom.

14 CTC [MR. MURPHY]: Your Honor, we would ask that this witness
15 and all our witnesses remain upstairs.

16 MJ [CAPT ALLRED]: Yes. I'm curious, are all your witnesses
17 upstairs now?

18 CTC [MR. MURPHY]: They are, Your Honor. If fact, my plan if
19 it's all right with the Court, is to have each agent get the next
20 witness.

21 MJ [CAPT ALLRED]: Fair enough.

22 CTC [MR. MURPHY]: And the next witness will be Special Agent
23 Robert [REDACTED].

1 MJ [CAPT ALLRED]: Why don't you bring down the next two, and
2 ask special agent whatever is number three then to sit in the
3 members' deliberation room. Would you mind doing that?

4 WIT [MR. [REDACTED]]: Yes, sir.

5 **[The witness was excused and withdrew from the courtroom.]**

6 CTC [MR. MURPHY]: Then next after Agent [REDACTED] it will be NCIS
7 Agent [REDACTED].

8 MJ [CAPT ALLRED]: Special Agent [REDACTED] [REDACTED], did you say?

9 CTC [MR. MURPHY]: Yes, sir. Special Agent [REDACTED],
10 [REDACTED].

11 **[The witness entered the courtroom.]**

12 CTC [MR. MURPHY]: Special Agent [REDACTED], if you could approach
13 the witness area to be sworn. And if you could stand and raise your
14 right hand.

15 [REDACTED], Civilian, was called as a witness for the prosecution,
16 was sworn, and testified as follows:

17 CTC [MR. MURPHY]: Please be seated.

18 **[The witness did as directed.]**

19 **DIRECT EXAMINATION**

20 **Question by the trial counsel:**

21 Q [MR. MURPHY]: Would you state your full name, and spell your
22 last name for the record.

23 A [MR. [REDACTED]]: [REDACTED]. The last name is spelled

1 [REDACTED].

2 Q [MR. MURPHY]: Who are you employed by and what are your
3 duties?

4 A [MR. [REDACTED]]: I'm employed by the Federal Bureau of
5 Investigation, assigned to the New York Office Joint Terrorism Task
6 Force.

7 Q [MR. MURPHY]: Please describe for this commission your formal
8 education and your law enforcement training.

9 A [MR. [REDACTED]]: I have a Bachelor of Science in criminal
10 justice and a Masters of Public Administration. Prior to coming to
11 the Bureau, I served nine years in the police department in New York.

12 Q [MR. MURPHY]: Do you have any specialized law enforcement
13 training?

14 A [MR. [REDACTED]]: Basic counterterrorism classes sponsored by the
15 New York office, in Quantico, as well as being a special agent bomb
16 technician.

17 Q [MR. MURPHY]: Did you receive an assignment to interview
18 Salim Hamdan also known as Saqr al Jadawi?

19 A [MR. [REDACTED]]: Yes, I did.

20 Q [MR. MURPHY]: When did you get this assignment?

21 A [MR. [REDACTED]]: Upon arriving in Afghanistan in February of
22 2002.

23

1 Q [MR. MURPHY]: Did you in fact interview him in person, with
2 others?

3 A [MR. [REDACTED]]: Yes, I did.

4 Q [MR. MURPHY]: Do you recognize Salim Hamdan in the courtroom
5 today?

6 A [MR. [REDACTED]]: Yes, I do.

7 Q [MR. MURPHY]: If you could, if you can, point to him and
8 identify an article of clothing he is wearing.

9 A [MR. [REDACTED]]: Seated third from the right, wearing white
10 traditional Islamic clothing and a tan coat.

11 CTC [MR. MURPHY]: Your Honor, may the record reflect that the
12 witness has properly identified the accused in this case.

13 MJ [CAPT ALLRED]: It may.

14 Q [MR. MURPHY]: During what time period did you interview the
15 accused?

16 A [MR. [REDACTED]]: Between February 2002 and March 2002.

17 Q [MR. MURPHY]: Where did you interview him?

18 A [MR. [REDACTED]]: At the U.S. military detention facility at the
19 Kandahar International Airport in Bagram--or, excuse me, Kandahar,
20 Afghanistan.

21 Q [MR. MURPHY]: Approximately, how many times did you interview
22 Salim Hamdan?

23 A [MR. [REDACTED]]: Four times.

1 Q [MR. MURPHY]: Could you describe in some detail the room or
2 the rooms where these interviews took place?

3 A [MR. ██████]: The interview--designated interview area
4 consisted of I believe three green military tents on each side of
5 basically a rectangular area, surrounded by razor wire, which was not
6 actually within the facility itself, detention facility.

7 Q [MR. MURPHY]: All right. Was it one room you were in or more
8 than one room?

9 A [MR. ██████]: Depending of the availability of the tents
10 during our interview time, the tent would hold maybe six people,
11 tops, with a table, chair, and the post for the tent.

12 Q [MR. MURPHY]: I'm waiting on my yellow to turn to green.
13 Were there other people in the interview rooms with you?

14 A [MR. ██████]: Yes.

15 Q [MR. MURPHY]: Who were they?

16 A [MR. ██████]: My partner that I deployed with, there was a
17 military translator, and a person usually with the U.S. Military
18 Criminal Investigative Division.

19 Q [MR. MURPHY]: In what language were the interviews conducted?

20 A [MR. ██████]: Arabic.

21 Q [MR. MURPHY]: Did everyone in the interview room speak
22 Arabic?

23 A [MR. ██████]: No.

1 Q [MR. MURPHY]: Was there a translation process for those in
2 the room who did not understand Arabic?

3 A [MR. [REDACTED]]: Yes. We would bring an MI-202 translator,
4 Arabic translator with us to assist us with gaining information from
5 Mr. Hamdan. What we would do initially on, we would ask the
6 translator--there were various ones that we worked with while we were
7 over there. We would ask them to please take our question and give
8 it verbatim to Mr. Hamdan so he understood exactly what we were
9 asking of him. And, in turn, Mr. Hamdan would reply to the
10 translator, and the translator would provide his answer.

11 Q [MR. MURPHY]: Using this process, were you able to understand
12 everything that Salim Hamdan said during these interviews?

13 A [MR. [REDACTED]]: Yes.

14 Q [MR. MURPHY]: What were the seating arrangements in the
15 interview rooms?

16 A [MR. [REDACTED]]: Like I stated before, there was a table and
17 there was a chair on one side of the table, and then three to four
18 chairs on the other side of the table. When Mr. Hamdan was brought
19 in, we would walk him--or, the MPs would walk him around to the other
20 side of the table where he would be seated and be able to face the
21 entrance or exit at the time. And then we would sit on the opposite
22 side of him.

23

1 Q [MR. MURPHY]: How close were you and the other investigating
2 agents, physically, to the accused during these interviews?

3 A [MR. ██████]: Two or three feet.

4 Q [MR. MURPHY]: How would you describe the tone of the
5 interviews with Mr. Hamdan?

6 A [MR. ██████]: Conversational, nonconfrontational, civil.

7 Q [MR. MURPHY]: I'm going to ask you to define a phrase; and
8 that is, how would you define the phrase open-ended questions?

9 A [MR. ██████]: A question posed that requires more than a
10 yes/no answer.

11 Q [MR. MURPHY]: Did you ask the accused open-ended questions
12 during your interviews?

13 A [MR. ██████]: Yes, we did.

14 Q [MR. MURPHY]: Did you or anyone else during any of the
15 interviews ever yell at Salim Hamdan or act in any manner that you
16 would consider threatening?

17 A [MR. ██████]: No. Actually, when we requested interview
18 times with the different detainees we met with, we would request
19 anyone that was in the interview with us to, if they had a question
20 or wanted clarification, to assist us, we would ask them to pose a
21 question to us first, and we would decide whether or not that would
22 be asked of them. So, no, we basically ran our interviews when we
23 set our times up.

1 Q [MR. MURPHY]: At any time during these interviews, did the
2 accused ever tell you he was abused or mistreated or tortured by
3 anyone at any time?

4 A [MR. [REDACTED]]: No.

5 Q [MR. MURPHY]: What would you have done if the accused made
6 such a report to you of abuse or mistreatment?

7 A [MR. [REDACTED]]: Well, I befriended the captain in charge of the
8 facility there, still friends with him today, actually. And if there
9 was an issue that we thought was inappropriate in terms of how we
10 deal with detainees or people we interviewed suspect-wise, I would
11 have brought that to his attention.

12 Q [MR. MURPHY]: That was not necessary?

13 A [MR. [REDACTED]]: Not once.

14 Q [MR. MURPHY]: Did you have an opportunity to observe the
15 accused's detention facility and the guards working at the detention
16 facility?

17 A [MR. [REDACTED]]: No. We interacted somewhat with the MPs based
18 on they were required to bring Mr. Hamdan out from the facility to
19 the interview area. So we would just deal with the MPs that were
20 escorting him.

21 [END OF PAGE]

1 Q [MR. MURPHY]: In dealing with the MPs that were escorting
2 him, did you ever observe or even hear any reports about guards
3 abusing this accused or any other detainee at this facility?

4 A [MR. [REDACTED]]: No.

5 Q [MR. MURPHY]: Did Salim Hamdan during your interviews ever
6 tell you that he was forced to speak against his will to anyone, or
7 that he made up false information just to please an interviewer, or
8 made up false information for any reason?

9 A [MR. [REDACTED]]: No.

10 Q [MR. MURPHY]: Did you provide the accused with opportunities
11 to eat or drink food and liquids during the interviews?

12 A [MR. [REDACTED]]: Yes. Actually, we would bring snacks and
13 usually MREs. That was the food available to us out there. We would
14 bring them to eat as well as for ourselves during the interviews. So
15 we would take breaks if Mr. Hamdan wanted to take a break to have a
16 snack, we would take a break.

17 Q [MR. MURPHY]: Did Salim Hamdan indicated a willingness to
18 talk to you?

19 A [MR. [REDACTED]]: Yes.

20 Q [MR. MURPHY]: How did he express this willingness?

21 A [MR. [REDACTED]]: By his tone and answering our questions.
22
23

1 Q [MR. MURPHY]: Did you provide any rights advisement to Salim
2 Hamdan during the interviews?

3 A [MR. [REDACTED]]: No.

4 Q [MR. MURPHY]: And I will just tick off the types of rights.
5 Such as Article 31 rights under the UCMJ or Miranda type rights?

6 A [MR. [REDACTED]]: No.

7 Q [MR. MURPHY]: And why is that?

8 A [MR. [REDACTED]]: FBI policy.

9 Q [MR. MURPHY]: Was it clear to you, as an interviewer, that
10 the accused was free to speak with you or not speak with you during
11 the course of your interviews with him?

12 A [MR. [REDACTED]]: Yes.

13 Q [MR. MURPHY]: How was that made clear to you?

14 A [MR. [REDACTED]]: By his willingness to talk to us during our
15 interviews.

16 Q [MR. MURPHY]: How long did your interviews last?

17 A [MR. [REDACTED]]: Total, approximately 20 hours.

18 Q [MR. MURPHY]: Was it important to you, as a federal law
19 enforcement special agent, that the information Salim Hamdan provided
20 to you was both reliable and accurate?

21 A [MR. [REDACTED]]: Absolutely.

22 Q [MR. MURPHY]: Why was that?

23 A [MR. [REDACTED]]: Well, primarily for battlefield intelligence,

1 tactical intelligence, to assist the military in their operations, as
2 well as to further assist FBI investigations back home as well as
3 abroad.

4 Q [MR. MURPHY]: You prepared FBI-302s as a result of these
5 interviews. Is that right?

6 A [MR. ██████████]: Correct.

7 Q [MR. MURPHY]: And you reviewed them in preparation for your
8 testimony today?

9 A [MR. ██████████]: Yes, I did.

10 Q [MR. MURPHY]: Tell us in summary fashion the key--I'm sorry.
11 Before I get to that, I want to get to some specific allegations.

12 Did you know about or order in any way that personal belongings
13 be removed from the accused during the interview process?

14 A [MR. ██████████]: No.

15 Q [MR. MURPHY]: Did you or did you learn about anyone
16 conditioning medical care on the success or lack of success of these
17 interviews?

18 A [MR. ██████████]: No.

19 Q [MR. MURPHY]: Did anyone, any interviewer or interrogator,
20 either male or female, or did Hamdan report that any interviewer,
21 male or female, mistreated him or abused him in any way?

22 A [MR. ██████████]: No.

23

1 Q [MR. MURPHY]: Did you, yourself, or did you hear of anyone
2 else order Mr. Hamdan into solitary confinement to facilitate the
3 interview process?

4 A [MR. [REDACTED]]: No.

5 Q [MR. MURPHY]: Did you learn from anyone, including Mr.
6 Hamdan, that there was alleged abuse at Bagram where a guard
7 allegedly put his knee in the back of Mr. Hamdan?

8 A [MR. [REDACTED]]: No.

9 Q [MR. MURPHY]: And this is specific to you and also Agent
10 [REDACTED], who previously testified. Did you, or did you learn about
11 anyone threatening to kill Mr. Hamdan?

12 A [MR. [REDACTED]]: No.

13 Q [MR. MURPHY]: Did you or anyone place a gun in his presence
14 in order to threaten?

15 A [MR. [REDACTED]]: No.

16 Q [MR. MURPHY]: Did he talk to you at all about Afghani local
17 forces killing an Arab, and that as a result he felt threatened by
18 U.S. forces or agent?

19 A [MR. [REDACTED]]: No.

20 Q [MR. MURPHY]: Did he say that he made up a false story to
21 agents about transporting weapons?

22 A [MR. [REDACTED]]: Not that I'm aware of.

23

1 Q [MR. MURPHY]: Did he say----

2 MJ [CAPT ALLRED]: What was the answer?

3 WIT [MR. [REDACTED]]: Not that I'm aware of.

4 MJ [CAPT ALLRED]: Thank you.

5 Q [MR. MURPHY]: Did he say putting a hood over his head caused
6 him to believe that he would be killed?

7 A [MR. [REDACTED]]: No.

8 Q [MR. MURPHY]: Did he say to you a detainee was beaten to
9 death in Bagram and, as a result, he was absolutely dependent on the
10 cooperation of U.S. officials?

11 A [MR. [REDACTED]]: No.

12 Q [MR. MURPHY]: Did he say anything to you about detainees
13 being beaten and left lying on tarmacs anywhere in extreme cold
14 weather, and that this caused Mr. Hamdan to believe he was at the
15 mercy of U.S. agents?

16 A [MR. [REDACTED]]: No.

17 Q [MR. MURPHY]: Can you provide us with a brief summary of the
18 key admissions made by Mr. Hamdan to you during your interviews with
19 him?

20 A [MR. [REDACTED]]: Initially he admitted to being a driver for
21 UBL, one of several. He admitted to knowing locations within
22 Kandahar, general facility, which we were able to remove Mr. Hamdan
23 from the facility for him to allow us to point out certain locations

1 within Kandahar and Tarnak Farms. So, in essence, in total he
2 identified three UBL compounds, one Arab guesthouse, and the cemetery
3 where he assisted in burying Abu Hafs Al-Masri.

4 Q [MR. MURPHY]: Could you at trial provide even greater details
5 about the specific admissions the accused provided to you during the
6 interviews?

7 A [MR. ██████████]: Yes.

8 Q [MR. MURPHY]: In order to corroborate at least part of the
9 admissions the accused made to you, did you ask him to draw two
10 diagrams for you of the Arab guesthouse you referenced and the Tarnak
11 Farms?

12 A [MR. ██████████]: Yes, we did.

13 CTC [MR. MURPHY]: Your Honor, we have two unclassified exhibits
14 that I believe will be marked next as 255 and 256. With the
15 permission of the Court, I would like to first show both of those to
16 the military judge. They are listed in our system as Bates stamped
17 18 and Bates stamped 19.

18 MJ [CAPT ALLRED]: Very good. Okay. May I see the second one?

19 Okay. Use those any way you wish.

20 CTC [MR. MURPHY]: Your Honor, at this point I would offer what
21 has been identified as Government Exhibit, Appellate Exhibit 255 and
22 256 in evidence, and ask that it be published to all.

23 **[APPELLATE EXHIBITS 255 AND 256.]**

1 MJ [CAPT ALLRED]: Very well. You may.

2 CTC [MR. MURPHY]: I would like to start with 255.

3 Q [MR. MURPHY]: I show you what is now marked as Appellate
4 Exhibit 255. Do you recognize this exhibit?

5 A [MR. [REDACTED]]: Yes, I do.

6 Q [MR. MURPHY]: What is it?

7 A [MR. [REDACTED]]: It's a map or a route describing, just for
8 clarification, I guess. There's a number of other roads or lines
9 drawn that indicate other locations. And this is from the initial
10 mission we took him on.

11 This map is in reference to the second mission we ended up
12 going on, which he identified an Arab guesthouse for us.

13 So he put a mosque and the guesthouse in his reference
14 based on our first mission to assist us with identifying an area of
15 Kandahar that we needed to set our mission up in.

16 So it basically depicts the locations from the first
17 mission that we went on, and then as you can see down at the bottom
18 with the notations that we make in English writing locating or X'ing
19 out the location of the Arab guesthouse. And then, obviously, we
20 made English notations to assist us with the drawing.

21 Q [MR. MURPHY]: Tell us in some detail how that diagram was
22 actually created. Who is doing the drawing?

23 A [MR. [REDACTED]]: Mr. Hamdan is drawing the lines. And then he

1 would point as to where we identified the initial locations, and then
2 proceeded to draw farther down the page with the different routes to
3 identify the mosque and the Arab guesthouse location.

4 Q [MR. MURPHY]: And what can you tell us, based on your own
5 investigation, is significant about this Arab guesthouse?

6 A [MR. ██████████]: Mr. Hamdan stayed there, as well as a number of
7 other people that attended the training camps.

8 Q [MR. MURPHY]: You then went with Mr. Hamdan to this location.
9 Is that right?

10 A [MR. ██████████]: We did.

11 Q [MR. MURPHY]: So we get the time sequence right, was this
12 diagram done before or after you visited the actual location?

13 A [MR. ██████████]: Prior to.

14 Q [MR. MURPHY]: Does it accurately reflect what you saw in that
15 notation?

16 A [MR. ██████████]: Yes, it does.

17 Q [MR. MURPHY]: Let's turn now to the second exhibit marked as
18 Government Appellate Exhibit 256. Do you recognize this diagram?

19 A [MR. ██████████]: Yes, I do.

20 Q [MR. MURPHY]: What is this?

21 A [MR. ██████████]: It's another route that Mr. Hamdan assisted us
22 with in identifying a UBL compound that is known as Tarnak Farms.
23 And basically where we were at the airport, he referenced the road

1 that leads to the airport being a main road that runs between
2 Kandahar and Spin Boldak along the border with Pakistan. So he made
3 the reference for us where the street was, and it's his hand actually
4 drawing the route itself. And then we would identify the locations
5 that we were aware of, such as the airport where Mr. Hamdan was
6 detained, and then described and drew as to how far out this compound
7 was.

8 So he indicated a reference, locations, a radar dish, which
9 obviously was translated for us. We wrote down "radar dish." And
10 then several miles down this dirt road, we come upon Tarnak Farms,
11 and then we have the English notation showing a riverbed and then the
12 X location of the Tarnak Farms compound.

13 Q [MR. MURPHY]: And you also took Mr. Hamdan to this location.
14 Is that correct?

15 A [MR. ████████]: Yes, we did.

16 Q [MR. MURPHY]: And did Mr. Hamdan draw this diagram before or
17 after you took him there?

18 A [MR. ████████]: Beforehand.

19 Q [MR. MURPHY]: And does it accurately reflect the Tarnak Farms
20 that you visited with him?

21 A [MR. ████████]: Yes, it does.

22 Q [MR. MURPHY]: Finally, where were you on September 11, 2001?

23 A [MR. ████████]: Working in New York.

1 CTC [MR. MURPHY]: Your Honor, I tender the witness.

2 MJ [CAPT ALLRED]: Very good.

3 **CROSS-EXAMINATION**

4 **Question by the defense counsel:**

5 Q [MR. SWIFT]: Good morning.

6 A [MR. ██████████]: Good afternoon.

7 Q [MR. SWIFT]: When did you arrive to Kandahar?

8 A [MR. ██████████]: Early February 2002.

9 Q [MR. SWIFT]: Before interviewing Mr. Hamdan, did you go over
10 any documents?

11 A [MR. ██████████]: I'm not sure if I did with Mr. Hamdan. I had
12 spoken to Agent ██████████ who just testified, and I basically
13 relieved him. So I did discuss with him, because he had actually
14 initially did the setup for the mission to happen. And then he went
15 home, and we basically picked up where he left off--where he
16 finished.

17 Q [MR. SWIFT]: When you spoke with Agent ██████████, did he tell
18 you about Mr. Hamdan?

19 A [MR. ██████████]: I believe just the basics: That he was a UBL
20 driver, knowledge of al Qaeda, member of al Qaeda. And basically the
21 information he obtained to go out on the first mission.

22

23

1 Q [MR. SWIFT]: Based on what he told you, did you consider him
2 a criminal suspect?

3 A [MR. ██████]: Yes.

4 Q [MR. SWIFT]: You said that you didn't read him rights based
5 on FBI policy. Is that correct?

6 A [MR. ██████]: That's correct.

7 Q [MR. SWIFT]: Have you interviewed other criminal suspects
8 outside the United States?

9 A [MR. ██████]: Yes.

10 Q [MR. SWIFT]: Have you interviewed other criminal suspects in
11 terrorism cases outside the United States?

12 A [MR. ██████]: Yes.

13 Q [MR. SWIFT]: Had you done so after September 11, 2001?

14 A [MR. ██████]: Yes.

15 Q [MR. SWIFT]: Did you read any of them their rights?

16 A [MR. ██████]: Yes.

17 Q [MR. SWIFT]: So it was only FBI policy in Afghanistan that
18 you didn't read rights?

19 A [MR. ██████]: It's possible. I'm not sure. I can't speak
20 for other countries.

21 Q [MR. SWIFT]: Let's be clear. You had interviewed other
22 criminal terrorist suspects.

23 A [MR. ██████]: Correct.

1 Q [MR. SWIFT]: After September 11th.

2 A [MR. ██████████]: Correct.

3 Q [MR. SWIFT]: Outside the United States.

4 A [MR. ██████████]: Correct.

5 Q [MR. SWIFT]: And you read those persons your rights--their
6 rights when you suspected them to be criminal suspects. Is that
7 correct?

8 A [MR. ██████████]: Correct.

9 Q [MR. SWIFT]: Now, when you spoke with Mr. Hamdan--and that
10 was on three or four occasions?

11 A [MR. ██████████]: Four.

12 Q [MR. SWIFT]: Four occasions. Does that count in addition to
13 the time, or are you counting the times that you went driving with
14 him as an occasion?

15 A [MR. ██████████]: Correct.

16 Q [MR. SWIFT]: In any of those occasions, did you ask him if he
17 had been abused?

18 A [MR. ██████████]: No.

19 Q [MR. SWIFT]: Did you ask him what had happened to him when he
20 was captured?

21 A [MR. ██████████]: No.

22

23

1 Q [MR. SWIFT]: Did you ask him about the conditions in which he
2 was being held in Kandahar?

3 A [MR. [REDACTED]]: No.

4 Q [MR. SWIFT]: Did you ask him conditions about which he was
5 being held in Bagram?

6 A [MR. [REDACTED]]: I believe he was in Bagram after he left
7 Kandahar.

8 Q [MR. SWIFT]: Excuse me, you're correct. Did you ask him
9 about conditions where he was held in Panjshir Valley?

10 A [MR. [REDACTED]]: Prior to his arrest or after his arrest?

11 Q [MR. SWIFT]: After his arrest.

12 A [MR. [REDACTED]]: Before he came to Kandahar?

13 Q [MR. SWIFT]: Before he came to Kandahar.

14 A [MR. [REDACTED]]: No.

15 Q [MR. SWIFT]: After you completed your interviews, did you see
16 Mr. Hamdan again, until this day?

17 A [MR. [REDACTED]]: I believe this is the first time.

18 Q [MR. SWIFT]: So you have no personal knowledge of how he was
19 treated in Guantanamo?

20 A [MR. [REDACTED]]: No.

21 [END OF PAGE]

22

23

1 Q [MR. SWIFT]: Would you agree with me that if you want to get
2 accurate information, as an FBI agent, that it's important that the
3 individual that you're interviewing has had sufficient sleep over the
4 period of time before you interviewed them? Do you think that's
5 important?

6 A [MR. ██████]: Yes.

7 Q [MR. SWIFT]: So you would agree with me that if they were
8 deprived of sleep, that would actually lead to a less accurate
9 interview. Wouldn't you say?

10 A [MR. ██████]: The potential is there.

11 Q [MR. SWIFT]: You certainly wouldn't--if it came to your
12 attention that someone had been kept up repeatedly for several nights
13 before you interviewed them, you would order that they be sent back
14 to sleep before you interview them. Wouldn't you?

15 A [MR. ██████]: If I knew beforehand?

16 Q [MR. SWIFT]: Yes.

17 A [MR. ██████]: I would probably ask the person if they were
18 comfortable to speak to me when I introduced myself.

19 Q [MR. SWIFT]: If they were comfortable, then you would
20 continue even though they hadn't slept in maybe 72 hours?

21 A [MR. ██████]: It's up to the person I'm speaking to.

22

23

1 Q [MR. SWIFT]: You don't think that it should be part of the
2 interrogation system not to sleep?

3 A [MR. [REDACTED]]: It's not my decision to make.

4 Q [MR. SWIFT]: Okay. Were you contacted that members of the
5 defense wanted to talk to you before you testified?

6 A [MR. [REDACTED]]: I was. I'm not sure if it was for Mr. Hamdan,
7 though.

8 Q [MR. SWIFT]: Did you agree to talk with the members of the
9 defense?

10 A [MR. [REDACTED]]: No.

11 Q [MR. SWIFT]: Why?

12 A [MR. [REDACTED]]: My preference.

13 CDC [MR. SWIFT]: No further questions.

14 MJ [CAPT ALLRED]: Thank you, Mr. Swift.

15 CTC [MR. MURPHY]: I do have one follow-up, Your Honor.

16 MJ [CAPT ALLRED]: Okay.

17 CTC [MR. MURPHY]: One question.

18 **REDIRECT EXAMINATION**

19 **Question by the trial counsel:**

20 Q [MR. MURPHY]: Did you see any evidence that Mr. Hamdan was
21 incapacitated by sleep deprivation when you interviewed him?

22 A [MR. [REDACTED]]: None.

23 CTC [MR. MURPHY]: Nothing further, Your Honor.

1 **EXAMINATION BY THE MILITARY COMMISSION**

2 **Question by the military judge:**

3 Q [CAPT ALLRED]: I just want to confirm what I think I heard,
4 which is that you were one of the two agents that drove around the
5 city of Kandahar with him?

6 A [MR. ████████]: That's correct, Your Honor.

7 Q [CAPT ALLRED]: Is the other agent going to testify today? Is
8 he here in the building, or do you know?

9 A [MR. ████████]: I don't believe he is here.

10 Q [CAPT ALLRED]: Don't believe he is here.

11 MJ [CAPT ALLRED]: Okay. Very good. Thank you for your
12 testimony. You can withdraw from the courtroom.

13 **[The witness was excused and withdrew from the courtroom.]**

14 And who is the next?

15 CTC [MR. MURPHY]: Your Honor, the next witness is NCIS agent,
16 Special Agent ██████████.

17 MJ [CAPT ALLRED]: We will probably break after his testimony.

18 CTC [MR. MURPHY]: Special Agent ██████████, if you could approach
19 the witness stand to be sworn. If you could face me and raise your
20 right hand.

21 **[END OF PAGE]**

1 [REDACTED], Civilian, was called as a witness for the
2 prosecution, was sworn, and testified as follows:

3 CTC [MR. MURPHY]: Please be seated.

4 [The witness did as directed.]

5 DIRECT EXAMINATION

6 Question by the trial counsel:

7 Q [MR. MURPHY]: Would you state your full name, and spell your
8 last name for the record.

9 A [MR. [REDACTED]]: [REDACTED]. [REDACTED].

10 Q [MR. MURPHY]: Who are you employed by, and what are your
11 duties?

12 A [MR. [REDACTED]]: I'm currently employed with the Naval
13 Criminal Investigative Service. I'm currently working at our
14 headquarters at the Washington Navy Yard in our Counter Intelligence
15 Division.

16 Q [MR. MURPHY]: Please describe for this commission your formal
17 education and your law enforcement training.

18 A [MR. [REDACTED]]: I have a Bachelor of Science degree in human
19 resources management. I attended a 16-week course at the Federal Law
20 Enforcement Training Center in Lanco, Georgia.

21 Q [MR. MURPHY]: Do you have any specialized law enforcement
22 training?

23 A [MR. [REDACTED]]: Yes. I attended a 16-week course at JCIDA.

1 It's for advanced war and counter intelligence.

2 Q [MR. MURPHY]: Did you receive an assignment to interview
3 Salim Hamdan, also known as Saqr al Jadawi?

4 A [MR. [REDACTED]]: Yes, I did.

5 Q [MR. MURPHY]: When did you get this assignment?

6 A [MR. [REDACTED]]: I was assigned to the CITF and to GTMO in
7 March of 2002 until--it was the end of March of 2002 until the end of
8 May 2002. I talked with Mr. Hamdan in May of 2002.

9 Q [MR. MURPHY]: And did you interview him with other people?

10 A [MR. [REDACTED]]: Yes, I did.

11 Q [MR. MURPHY]: I would ask if you recognize Salim Hamdan in
12 the courtroom today?

13 A [MR. [REDACTED]]: Yes, I do.

14 Q [MR. MURPHY]: And if you could, can you point to him and
15 identify an article of clothing he is wearing?

16 A [MR. [REDACTED]]: He is sitting right there, and he has a tan
17 colored jacket on.

18 CTC [MR. MURPHY]: Your Honor, may the record reflect that the
19 witness has properly identified the accused in this case?

20 MJ [CAPT ALLRED]: It may.

21 Q [MR. MURPHY]: During what period did you interview the
22 accused?

23 A [MR. [REDACTED]]: Again, it was in May of 2002.

1 Q [MR. MURPHY]: And where did you interview him?

2 A [MR. [REDACTED]]: Camp Delta, GTMO.

3 Q [MR. MURPHY]: Approximately how many times did you conduct
4 interviews?

5 A [MR. [REDACTED]]: I believe it was three times.

6 Q [MR. MURPHY]: Would you describe in some detail the room or
7 rooms where the interviews took place.

8 A [MR. [REDACTED]]: The room was approximately 10 by 12, had a
9 table much like the one that they're sitting behind now and you're
10 sitting behind over here. Folding table. There were approximately
11 four chairs on our side of the table, one chair on the detainee's
12 side of the table. A one-way mirror on one wall, and a bolt on the
13 other side of the table where the detainee sat.

14 Q [MR. MURPHY]: You've already said you conducted these
15 interviews with others. Who else was with you?

16 A [MR. [REDACTED]]: It was myself, my partner; I was teamed up
17 with an FBI special agent, the translator, and a member of another
18 government agency.

19 Q [MR. MURPHY]: In what language were the interviews conducted?

20 A [MR. [REDACTED]]: Arabic.

21 Q [MR. MURPHY]: And did everyone in the room understand Arabic?

22 A [MR. [REDACTED]]: No.

23

1 Q [MR. MURPHY]: Was there a translation process in place?

2 A [MR. ██████████]: Yes, there was.

3 Q [MR. MURPHY]: Can you describe how that occurred, and
4 specifically the mechanics of how the question was stated,
5 translated, answered, retranslated?

6 A [MR. ██████████]: Okay. We would--the translator would usually
7 sit between me and my partner. We would pose a question to the
8 detainee, made sure that the translator understood exactly the
9 question that we were trying to ask. He would ask the question to
10 the detainee.

11 Q [MR. MURPHY]: If I could just get you to slow down a little
12 bit.

13 A [MR. ██████████]: Slow down? Okay.

14 Q [MR. MURPHY]: For our translation process.

15 A [MR. ██████████]: We wanted to make sure that the detainee--the
16 translator informed the detainee when he was responding to the
17 questions that we posed, that he answer the questions to us and not
18 the translator. So he understood who was in control of the process
19 at that time.

20 Q [MR. MURPHY]: Using this process, were you able to understand
21 everything that Salim Hamdan had said during the interviews?

22 A [MR. ██████████]: Yes, we could.

23

1 Q [MR. MURPHY]: Tell us a little bit about the seating
2 arrangements in the room.

3 Again, there was a folding table in the room. There were
4 approximately four folding chairs on our side of the room. It would
5 be myself, the translator, the special agent, FBI special agent, and
6 when another representative from the other government agency was
7 there it would be at the other end. The detainee would be on the
8 other side of the table approximately three to four feet away from us
9 in a folding chair, again, shackled to the floor.

10 Q [MR. MURPHY]: How close physically were you and the other
11 agents to the accused?

12 A [MR. [REDACTED]]: Again, he was across the table. I would say
13 approximately three to four feet.

14 Q [MR. MURPHY]: How would you describe the tone of the
15 interviews?

16 A [MR. [REDACTED]]: Cordial. Nonconfrontational.

17 Q [MR. MURPHY]: I'm going to ask you to define the phrase
18 "open-ended questions."

19 A [MR. [REDACTED]]: Okay.

20 Q [MR. MURPHY]: How would you define that for us?

21 A [MR. [REDACTED]]: Asking a question to elicit more than a yes
22 or no response from the individual that we're interviewing.

23

1 Q [MR. MURPHY]: Would you in fact ask Mr. Hamdan open-ended
2 questions?

3 A [MR. [REDACTED]]: Yes, we did.

4 Q [MR. MURPHY]: Did you or anyone else during any of these
5 interviews ever yell at Salim Hamdan or act in any manner that you
6 would consider to be threatening?

7 A [MR. [REDACTED]]: No, we did not.

8 Q [MR. MURPHY]: At any time, did Salim Hamdan tell you that he
9 was abused, mistreated, or tortured by anyone?

10 A [MR. [REDACTED]]: No, he did not.

11 Q [MR. MURPHY]: What would you have done if you had a report of
12 abuse or torture by him?

13 A [MR. [REDACTED]]: If he would have informed us of that
14 information, we would have wanted more information concerning the
15 abuse that he was reporting to us. I would have documented it, and
16 we would have reported it to our superiors.

17 Q [MR. MURPHY]: That wasn't necessary in this case?

18 A [MR. [REDACTED]]: No, it was not.

19 Q [MR. MURPHY]: Did you have an opportunity to observe the
20 accused's detention facility and the guards working at the detention
21 facility?

22 A [MR. [REDACTED]]: I did not see the detention facility itself.
23 But I did see the guards and how they interacted with Mr. Hamdan as

1 far as bringing him to the room for interviewing.

2 Q [MR. MURPHY]: And how would you describe what you saw?

3 A [MR. [REDACTED]]: He would be--as they brought him into the
4 room, we would be standing outside the room so they could move him
5 into the room. There wasn't enough space for all of us to be there.
6 He was shackled at the waist, the feet, at the hands. They would
7 walk him into the room, sit him down in the chair, make sure he was
8 bolted to the ground beneath the chair.

9 Q [MR. MURPHY]: Was anything done with the restraints, other
10 restraints?

11 A [MR. [REDACTED]]: Yes. We would make sure that before they
12 left that they would take the hand restraints off.

13 Q [MR. MURPHY]: So how was he restrained during the interview?

14 A [MR. [REDACTED]]: He was just bolted at the waist and at the
15 feet onto the floor.

16 Q [MR. MURPHY]: Nothing on the hands?

17 A [MR. [REDACTED]]: No.

18 Q [MR. MURPHY]: Did you ever observe or hear any reports of
19 guards abusing this accused or any other detainee?

20 A [MR. [REDACTED]]: No.

21 [END OF PAGE]

22

23

1 Q [MR. MURPHY]: Did Mr. Hamdan tell you he was ever forced to
2 speak against his will to anyone, or that he made up false
3 information just to please an interviewer, or made up false
4 information for any reason?

5 A [MR. ██████████]: No, he did not.

6 Q [MR. MURPHY]: Did you provide Mr. Hamdan with the opportunity
7 to eat and drink?

8 A [MR. ██████████]: Yes, we did.

9 Q [MR. MURPHY]: And how did you do that?

10 A [MR. ██████████]: Usually the first thing we did when we came
11 into the room, we would ask him how he was doing and if he would like
12 something to drink, if he would like something to eat before we got
13 started. That was typical.

14 Q [MR. MURPHY]: Did Mr. Hamdan indicate a willingness to talk
15 to you?

16 A [MR. ██████████]: Yes, he did.

17 Q [MR. MURPHY]: How did he express that to you?

18 A [MR. ██████████]: He was open to our questions. He never
19 indicated that he was unwilling to speak to us at all. Some of the
20 other detainees that we dealt with, it was pretty obvious when they
21 did not want to talk to us. And he never showed any inclination not
22 the talk with us.

23

1 Q [MR. MURPHY]: Did you provide Mr. Hamdan with any Article 31
2 rights warnings or any Miranda-type warnings at that time?

3 A [MR. [REDACTED]]: No, we did not.

4 Q [MR. MURPHY]: Why was that?

5 A [MR. [REDACTED]]: It was standing policy at that time that we
6 would not be doing that, not advising the detainees of rights.

7 Q [MR. MURPHY]: Was it clear to you as an investigator and
8 special agent that the accused was free to speak with you or not
9 speak to you during the course of these interviews?

10 A [MR. [REDACTED]]: Yes.

11 Q [MR. MURPHY]: How was that made clear to you?

12 A [MR. [REDACTED]]: Typically, we would ask if he was willing to
13 speak to us, to answer any questions that we did have for him. And I
14 think on all the occasions that we did speak to him, that it was,
15 yeah, he was willing to talk. He did indicate that.

16 Q [MR. MURPHY]: How long did the interviews last?

17 A [MR. [REDACTED]]: Depended on how much information we were
18 trying to I guess elicit from him at that time, no more than two
19 hours, two and a half hours.

20 Q [MR. MURPHY]: Was it important to you as an agent on this
21 case that the information you received was reliable and accurate?

22 A [MR. [REDACTED]]: Yes, it was.

23

1 Q [MR. MURPHY]: Why is that?

2 A [MR. [REDACTED]]: Not only to verify the information that we
3 had initially concerning him to make sure that we were speaking to
4 the individual we believed we were speaking to, but also to determine
5 what events or what information he might have that could impact on
6 future events. We were looking for actionable information that could
7 help with the individuals that were in Afghanistan at that time.

8 Q [MR. MURPHY]: All right. Did you summarize the results of
9 your investigation in a CITF, that is, Criminal Investigative Task
10 Force, form 40?

11 A [MR. [REDACTED]]: We used an FBI 302.

12 Q [MR. MURPHY]: You used an FBI 302?

13 A [MR. [REDACTED]]: Correct.

14 Q [MR. MURPHY]: Tell us how you prepared that.

15 A [MR. [REDACTED]]: We would take our notes soon after we did the
16 interviews. At that time we were running through the interviews, so
17 it was like as soon as we were able to get to the CITF to sit down
18 and do them, we would take our notes, get on the computer and bring
19 up the 302 form, and just put on the 302 form the information that we
20 had in our notes.

21 Q [MR. MURPHY]: All right. Have you reviewed that 302 prior to
22 your testimony today?

23 A [MR. [REDACTED]]: Yes.

1 Q [MR. MURPHY]: I would like to turn to some information that's
2 come out at the hearing about certain allegations regarding
3 interviewers and the interview process. Do you have any knowledge at
4 all of guards or anyone taking away personal property from detainees,
5 or Mr. Hamdan in particular, in order to facilitate your interviews?

6 A [MR. [REDACTED]]: No.

7 Q [MR. MURPHY]: Do you have any information from anywhere that
8 medical care was conditioned on how well interviews were conducted by
9 you and others?

10 A [MR. [REDACTED]]: No.

11 Q [MR. MURPHY]: Did you have any reports or any knowledge
12 whatsoever that any guard or interviewer abused Mr. Hamdan, be that
13 person male or female?

14 A [MR. [REDACTED]]: No.

15 Q [MR. MURPHY]: Did you, or did you learn about anyone,
16 ordering Mr. Hamdan into solitary confinement to facilitate any
17 interviews?

18 A [MR. [REDACTED]]: No.

19 Q [MR. MURPHY]: Did you hear about any abuse at Bagram,
20 including an allegation that a soldier put his knee into Mr. Hamdan's
21 back?

22 A [MR. [REDACTED]]: No.

23

1 Q [MR. MURPHY]: Did you or anyone threaten to kill Mr. Hamdan?

2 A [MR. [REDACTED]]: No.

3 Q [MR. MURPHY]: Did Mr. Hamdan report to you any fears he had
4 because local Afghani forces are alleged to have shot and killed an
5 Arab, and that Mr. Hamdan saw this and himself felt threatened by
6 U.S. forces and agents?

7 A [MR. [REDACTED]]: No.

8 Q [MR. MURPHY]: Did Mr. Hamdan tell you he made up a false
9 story to federal agents or anyone else about transporting weapons?

10 A [MR. [REDACTED]]: No, he did not.

11 Q [MR. MURPHY]: Did he tell you that by someone placing a hood
12 over his head, he believed that he would be killed?

13 A [MR. [REDACTED]]: No, he did not.

14 Q [MR. MURPHY]: Did he report to you that he saw detainees
15 beaten in Bagram, and that as a result he felt that his
16 cooperation--or, his survival depended on cooperation with U.S.
17 officials?

18 A [MR. [REDACTED]]: No, he did not.

19 Q [MR. MURPHY]: Did Mr. Hamdan report to you seeing other
20 detainees beaten anywhere and left lying on a tarmac anywhere in
21 extreme cold weather, and that that caused him to believe that he was
22 at the mercy of the U.S. agents?

23 A [MR. [REDACTED]]: No, he did not.

1 Q [MR. MURPHY]: Can you provide us with a brief summary of the
2 key admissions that Mr. Hamdan made to you during your interviews?

3 A [MR. [REDACTED]]: Yes.

4 Q [MR. MURPHY]: Please do so.

5 A [MR. [REDACTED]]: Throughout the course of the interview, he
6 informed us that he knew approximately a week in advance that an
7 operation was going to take place. He informed us that he was a
8 driver for Osama bin Laden, and he had heard of this information in
9 the car while he was driving him that an operation was going to take
10 place.

11 He then told us that after 9/11 took place, approximately
12 the day after that, he had asked Osama bin Laden if that was the
13 operation that he had been talking about, that UBL had been talking
14 about, to which UBL told him that, yes, it was the operation that had
15 been planned.

16 Q [MR. MURPHY]: And could you at trial provide even greater
17 detail about certain specific admissions the accused made to you
18 during your interview?

19 A [MR. [REDACTED]]: Yes.

20 Q [MR. MURPHY]: In order to corroborate part of the admissions
21 the accused made to you, did you ask him if he could identify
22 pictures that are now recorded on five sheets?

23 A [MR. [REDACTED]]: Yes, we did.

1 Q [MR. MURPHY]: How did you select those photos to show the
2 accused?

3 A [MR. [REDACTED]]: Early on in the process, me and the detective
4 I was working with at the time, we realized that we were kind of
5 haphazardly going through the detainees, and we started to realize
6 that we were speaking to a lot of the bodyguards that were the
7 individuals that had been identified in reports as being bodyguards.
8 So we went to our superiors and asked them if we could just be
9 assigned to just talk to those individuals.

10 So we pulled the photos of those individuals that had been
11 identified as body guards and separated them from the pack and showed
12 him those photos.

13 CTC [MR. MURPHY]: All right. Your Honor, we would now turn to
14 what is classified information. As the Court is aware, we discussed
15 this earlier, we have brought Mr. Powell in for the discussion to
16 ensure that we are following all procedures properly. What we
17 propose doing is having this displayed on the monitors only for Your
18 Honor, and in small monitors, certainly not the big one behind the
19 witness but small monitor in front of the witness. That will shield
20 it from the view of the gallery.

21 MJ [CAPT ALLRED]: Okay.

22 CTC [MR. MURPHY]: We also have a hard copy of this evidence
23 that I will now hand to defense counsel. Mr. Powell and I have

1 discussed this at length, and he agrees and I agree that this is the
2 appropriate method of showing to the defense during this examination.

3 MJ [CAPT ALLRED]: Who is going to be--are you running the
4 controls here? You know how to control the photos in this way? Very
5 good. Thank you.

6 CTC [MR. MURPHY]: All right. I would propose, Your Honor, that
7 these five sheets, that contains a total of five sheets, all be
8 marked collectively, unless the Court wants them individually marked,
9 although I would recommend collectively, as Appellate Exhibit 257,
10 the next exhibit in order. And I would first ask that these exhibits
11 or these attachments I will mark this exhibit 257, that these first
12 be shown sequentially to the military judge only.

13 MJ [CAPT ALLRED]: Okay. There's page one.

14 **[APPELLATE EXHIBIT 257.]**

15 CTC [MR. MURPHY]: It's displaying here, Your Honor, on my
16 screen. Now it's not.

17 MJ [CAPT ALLRED]: Now they're not in any. I just took it down.
18 Have we figured out the technology? Maybe to be safe, we could turn
19 these monitors off.

20 CTC [MR. MURPHY]: Your Honor, we will turn off the monitors
21 here.

22 MJ [CAPT ALLRED]: All right.

23 TC [LCDR STONE]: Those don't work. Okay.

1 MJ [CAPT ALLRED]: It's once again displaying on my screen. Can
2 you see the image? Okay. Is this the only monitor that's working
3 now?

4 CTC [MR. MURPHY]: This way, Your Honor, it's only being shown
5 to you.

6 MJ [CAPT ALLRED]: Okay. That was the plan.

7 CTC [MR. MURPHY]: Because I'm not seeing what you're seeing,
8 I'm asking that all five pages be shown.

9 MJ [CAPT ALLRED]: Why don't you cycle through those, Mr. Gibbs.
10 Sergeant Gibbs. There's page 2, there's page 3, page 4. I can see
11 all five.

12 CTC [MR. MURPHY]: Now I would ask, with the permission of the
13 Court, that the image be shown in addition to the witness.

14 MJ [CAPT ALLRED]: You may do that.

15 CTC [MR. MURPHY]: All right.

16 **Continued questions by the trial counsel:**

17 Q [MR. MURPHY]: Agent [REDACTED], Do you see the image?

18 A [MR. [REDACTED]]: Yes, I do.

19 Q [MR. MURPHY]: All right. Can you describe just generally
20 what you are viewing?

21 A [MR. [REDACTED]]: I'm looking at a sheet with six photos of
22 detainees that have been photocopied.

23

1 Q [MR. MURPHY]: Did you show these photos to the accused, Mr.
2 Salim Hamdan?

3 A [MR. [REDACTED]]: Not like this. We showed individual colored
4 photos to Mr. Hamdan.

5 Q [MR. MURPHY]: But all of those that are appearing in that
6 form were shown?

7 A [MR. [REDACTED]]: Yes, they were.

8 Q [MR. MURPHY]: And did you make certain notations on each of
9 those photos?

10 A [MR. [REDACTED]]: Yes, we did.

11 Q [MR. MURPHY]: Could you explain those notations?

12 A [MR. [REDACTED]]: When Mr. Hamdan identified one of the
13 pictures, whoever was taking notes at that time noted on the sheet
14 here exactly what he had said and who he identified and how he
15 identified them.

16 Q [MR. MURPHY]: Did you record that on that document?

17 A [MR. [REDACTED]]: Yes, we did.

18 Q [MR. MURPHY]: And is that your handwriting that we're looking
19 at on that document?

20 A [MR. [REDACTED]]: I believe so.

21 Q [MR. MURPHY]: Or another agent's?

22 A [MR. [REDACTED]]: I believe it's mine.

23

1 Q [MR. MURPHY]: But it's not the accused's?

2 A [MR. [REDACTED]]: No.

3 Q [MR. MURPHY]: Okay. What I want to do is go through each of
4 these sheets and have you identify by quadrant, either top two,
5 middle two, lower two, and tell us left or right what, if anything,
6 Mr. Hamdan said about those photos.

7 A [MR. [REDACTED]]: Okay.

8 Q [MR. MURPHY]: Let's have a discussion of each one.

9 A [MR. [REDACTED]]: Sure.

10 Q [MR. MURPHY]: Okay?

11 A [MR. [REDACTED]]: Top right.

12 Q [MR. MURPHY]: Just guide us through by telling us which
13 quadrant you're referring to.

14 A [MR. [REDACTED]]: Okay. Top right, we'd asked Mr. Hamdan if he
15 could identify this individual. He informed us that he had seen that
16 individual in Kabul at the Saudi guesthouse.

17 Middle left, all he could provide us at that time was that
18 he had seen that individual at Kabul.

19 The bottom left, he identified that individual as Hammam,
20 and that he had seen him at Jalalabad.

21 Q [MR. MURPHY]: And the other photos on that page?

22 A [MR. [REDACTED]]: The bottom right, he identified again that he
23 had seen that individual in Kabul.

1 Q [MR. MURPHY]: Did he provide any other information regarding
2 those series of photos?

3 A [MR. ██████████]: No, that was it.

4 Q [MR. MURPHY]: All right. I would now ask that we turn to the
5 next page.

6 A [MR. ██████████]: Very well. The bottom right, he identified
7 that individual as Anas, and he was from Yemen. And we had notated
8 also with an asterisk that he had identified that individual as a
9 bodyguard.

10 Q [MR. MURPHY]: And when you say a bodyguard, a bodyguard for
11 whom?

12 A [MR. ██████████]: A bodyguard for Osama bin Laden.

13 Q [MR. MURPHY]: When you indicate that kind of identification,
14 please tell us that. Okay?

15 A [MR. ██████████]: Sure.

16 Q [MR. MURPHY]: Okay. Please continue going through the
17 quadrants.

18 A [MR. ██████████]: Top left, he had indicated that he had seen
19 that guy in Kabul, in Kandahar.

20 The middle left, he identified that individual as Saqr from
21 Saudi Arabia, and he identified him as a UBL bodyguard.

22 The bottom left, he identified that individual as Abu
23 Ghanim, also said he was from Yemen, and also identified him as an

1 UBL bodyguard.

2 Q [MR. MURPHY]: Does that complete that page?

3 A [MR. [REDACTED]]: He identified the last person on the page on
4 the bottom right. I can't quite make out my notation there of where
5 he identified him from.

6 Q [MR. MURPHY]: Okay. Did he say anything about that person?

7 A [MR. [REDACTED]]: No. Just that he had seen that individual at
8 a location.

9 Q [MR. MURPHY]: Okay. That takes care of the second sheet.
10 Let's now turn to the third sheet.

11 A [MR. [REDACTED]]: The top left, he indicated that he saw that
12 individual at the Kandahar guesthouse.

13 Q [MR. MURPHY]: And I'd just note, just to slow a little bit.

14 A [MR. [REDACTED]]: Sure. The middle left, he identified that
15 individual as Khobeib Sudani, and also identified him as a UBL
16 bodyguard and that he was married to the individual, bottom left, who
17 identified as Asem al Mashrebi, and also who was a UBL bodyguard.

18 Q [MR. MURPHY]: All right. Does that complete that page?

19 A [MR. [REDACTED]]: Yes, it does.

20 Q [MR. MURPHY]: Let's turn to now the fourth sheet in this
21 exhibit.

22 MJ [CAPT ALLRED]: This is fifth?

23

1 Q [MR. MURPHY]: Please tell us what the accused said about
2 those photos.

3 A [MR. [REDACTED]]: Top left, he identified seeing that
4 individual in Kandahar at the guesthouse. The top right, the same.
5 He identified seeing that individual at the Kandahar guesthouse.
6 That was it.

7 Q [MR. MURPHY]: Okay. That completes sheet four. Now let's
8 turn to the final sheet, sheet five.

9 A [MR. [REDACTED]]: I think that was the final sheet.

10 Q [MR. MURPHY]: Does that complete the photos? Okay. All
11 right. Did these photos provide you with independent corroboration
12 of at least part of the admissions made to you by the accused Salim
13 Hamdan?

14 A [MR. [REDACTED]]: After we identified the individuals, we were
15 able to go back to CITF and verify that the individuals that he did
16 identify did marry up with information that we had concerning those
17 individuals.

18 Q [MR. MURPHY]: He was correct?

19 A [MR. [REDACTED]]: Yes, he was.

20 Q [MR. MURPHY]: Including as to the evidence of those others
21 being Osama bin Laden bodyguards?

22 A [MR. [REDACTED]]: That's correct.

23 CTC [MR. MURPHY]: Your Honor, I would tender the witness and

1 ask that we now take down all of the classified exhibits.

2 MJ [CAPT ALLRED]: Very well.

3 CTC [MR. MURPHY]: And with the permission of the court, I would
4 like to retrieve the classified hard copies provided to defense
5 counsel.

6 MJ [CAPT ALLRED]: Okay. Sergeant Gibbs has the original hard
7 copy document, it looks like.

8 CTC [MR. MURPHY]: The original hard copies have now been
9 returned to Technical Sergeant Gibbs.

10 MJ [CAPT ALLRED]: Very good.

11 CDC [MR. SCHNEIDER]: What is the court's pleasure? I would
12 note that Mr. Hamdan has requested a break. I don't know if you
13 intend to go to 12:30, past 12:30.

14 MJ [CAPT ALLRED]: I intended to wrap up as soon as you finished
15 your cross-examination. If he needs a break before that, I'm happy
16 to accommodate.

17 CDC [MR. SCHNEIDER]: Okay. I've been encouraged by more than
18 Your Honor, to go quickly.

19 **CROSS-EXAMINATION**

20 **Question by the defense counsel:**

21 Q [MR. SCHNEIDER]: So, Mr. [REDACTED], good afternoon. How are
22 you?

23 A [MR. [REDACTED]]: Good afternoon. Fine.

1 Q [MR. SCHNEIDER]: My name is Harry Schneider; I represent Mr.
2 Hamdan. You mentioned something about you wanted to have access to
3 the bodyguards?

4 A [MR. ██████████]: Correct.

5 Q [MR. SCHNEIDER]: I may have misunderstood you. What exactly
6 did you say?

7 A [MR. ██████████]: At the time when we were doing our interviews
8 with the individuals that were in the camp, we were just selecting
9 individuals at random. We were being told who to talk to. Through
10 the course of doing it, me and the individual I was teamed with
11 realized that, based on the information that we had at the CITF, it
12 appeared that we were talking to a number of individuals who had been
13 identified as bodyguards. So we went to our superiors and said, what
14 we would like to do, seeing as how we have already been talking to
15 these individuals, is pull them to one group and then just have us,
16 me and my partner, sit there and talk to these individuals.

17 Q [MR. SCHNEIDER]: Fair enough. Have you read your reports
18 recently?

19 A [MR. ██████████]: I've looked over them. Yes.

20 Q [MR. SCHNEIDER]: On the way down you mean?

21 A [MR. ██████████]: Yeah.

22

23

1 Q [MR. SCHNEIDER]: I didn't see you on the plane. I just
2 assumed. Can you tell me where in any of your three written reports
3 you made reference to how Mr. Hamdan responded when you asked him if
4 he was a driver?

5 A [MR. ██████████]: We had asked him--well, we had asked him at
6 the time what his position was as far as his position with UBL. He
7 did tell us he was a driver.

8 Q [MR. SCHNEIDER]: A driver?

9 A [MR. ██████████]: A driver. Correct.

10 Q [MR. SCHNEIDER]: Do you remember anywhere in the report where
11 you noted what he said when you asked him whether he was a bodyguard?

12 A [MR. ██████████]: Off the top of my head, no, in my reports.

13 Q [MR. SCHNEIDER]: The photos, as I have not even looked at
14 them. But can you tell me what the significance is of those photos
15 with regard to how Mr. Hamdan was treated during this interrogation?

16 A [MR. ██████████]: None.

17 Q [MR. SCHNEIDER]: You did three reports. Correct?

18 A [MR. ██████████]: Correct.

19 Q [MR. SCHNEIDER]: In each instance, there was someone other
20 than yourself and the indicated individual present. Right?

21 A [MR. ██████████]: It was myself, the translator, the special
22 agent I was assigned with, my team member, and another member of
23 another government agency.

1 Q [MR. SCHNEIDER]: Another government agency?

2 A [MR. [REDACTED]]: Yes.

3 Q [MR. SCHNEIDER]: I don't want you to tell me anything that's

4 classified. But did you know what agency that was?

5 A [MR. [REDACTED]]: Yes, I did.

6 CTC [MR. MURPHY]: Objection, Your Honor.

7 MJ [CAPT ALLRED]: I think Mr. Schneider is being very careful

8 not to ask what agency that was.

9 CTC [MR. MURPHY]: I think we can wrap this up very quickly on

10 the break. But it's not--I believe it does not impact Order 111.

11 MJ [CAPT ALLRED]: You believe it does not. Okay. Let's step

12 away from that area.

13 CDC [MR. SCHNEIDER]: Step away from that area?

14 MJ [CAPT ALLRED]: Please step away.

15 CDC [MR. SCHNEIDER]: All right.

16 Q [MR. SCHNEIDER]: With respect to the time that Mr. Hamdan was

17 in the custody of the Afghani soldiers, after apprehended and before

18 he was turned over to the Americans, did you ask him anything about

19 how he was treated during that time?

20 A [MR. [REDACTED]]: No, we didn't.

21 Q [MR. SCHNEIDER]: Did you ask him anything about what he

22 witnessed when he was apprehended?

23 A [MR. [REDACTED]]: No, we didn't.

1 Q [MR. SCHNEIDER]: Did he tell you anything about what happened
2 when he was apprehended?

3 A [MR. ██████████]: I recall he didn't go into detail about it.

4 Q [MR. SCHNEIDER]: Do you recall that he told you there was a
5 car in front of him in which an Arab was removed and shot and killed?

6 A [MR. ██████████]: He did tell us about having being [sic] in a
7 vehicle and there was a car in front of him. I don't remember him
8 telling us about somebody being shot in the car.

9 Q [MR. SCHNEIDER]: Did you actually dictate the notes or write
10 the notes?

11 A [MR. ██████████]: I'm not sure at this point whether it was me
12 that was writing, taking the notes, or actually doing the interview.

13 Q [MR. SCHNEIDER]: Just one more question.

14 A [MR. ██████████]: Sure.

15 Q [MR. SCHNEIDER]: You don't recall him stating, quote, "There
16 was another car in front of him, and the driver of that car, who
17 Hamdan believed was Yemeni, was shot and killed"?

18 A [MR. ██████████]: I would say if it's in my notes, then
19 obviously then he must have told me that.

20 Q [MR. SCHNEIDER]: How about the car behind him? What did he
21 tell you about that?

22 A [MR. ██████████]: He didn't--off the top of my head, I don't
23 think he knew of anybody in that car behind him.

1 Q [MR. SCHNEIDER]: The last question on the second part. Did
2 he tell you that the car behind him contained two individuals in
3 addition to a man named Boujaadia?

4 A [MR. [REDACTED]]: Yeah, he did.

5 Q [MR. SCHNEIDER]: And that those two were also killed?

6 A [MR. [REDACTED]]: Also killed?

7 Q [MR. SCHNEIDER]: Were killed, quote, in your prepared report.

8 A [MR. [REDACTED]]: It doesn't ring a bell.

9 Q [MR. SCHNEIDER]: Forgive me if I ask you to repeat something.
10 But you did not advise him of his rights?

11 A [MR. [REDACTED]]: That's correct.

12 Q [MR. SCHNEIDER]: Are there certain standard policies and
13 procedures that you usually follow when you're interrogating someone
14 who is a suspect in an ongoing criminal investigation?

15 A [MR. [REDACTED]]: Yes, there are.

16 Q [MR. SCHNEIDER]: Does that routine usually include advisement
17 of rights?

18 A [MR. [REDACTED]]: That's correct.

19 Q [MR. SCHNEIDER]: Does it depend on what country you're in
20 whether you give rights?

21 A [MR. [REDACTED]]: No.

22

23

1 Q [MR. SCHNEIDER]: Does it depend what kind of crimes are
2 alleged?

3 A [MR. [REDACTED]]: No.

4 Q [MR. SCHNEIDER]: Even a minor crime, you do?

5 A [MR. [REDACTED]]: If they're a suspect. Yes.

6 Q [MR. SCHNEIDER]: Okay. And was Hamdan a suspect in May of
7 2002?

8 A [MR. [REDACTED]]: At that time, according to what we were told,
9 we were just informed that he was not a suspect. We didn't know
10 everything we knew--we needed to know about him. So we were not
11 advising his rights.

12 Q [MR. SCHNEIDER]: And nothing you learned when you were
13 talking to him on those three occasions in May of 2002, May 1st, May
14 7th, and May 17th, caused you to think he was a suspect?

15 A [MR. [REDACTED]]: Again, at the time the standing policy was
16 that we would not advise of the rights.

17 Q [MR. SCHNEIDER]: I'll get to the policy in just a second.
18 Did you hear anything on those three days you interrogated him which
19 caused you to think he was a suspect in a crime?

20 A [MR. [REDACTED]]: A suspect in a crime? I wasn't--I wasn't
21 investigating a crime at that time. I was trying to gather
22 information from an individual who was in a wartime environment that
23 could help us out proactively.

1 Q [MR. SCHNEIDER]: Fair enough. It's hard to say because it
2 didn't happen; but if you had heard something which caused you to
3 think that he had violated some crime or was going through a crime or
4 was a suspect in a crime, you would have stopped and given him his
5 rights?

6 A [MR. ██████████]: At this time?

7 Q [MR. SCHNEIDER]: Yes.

8 A [MR. ██████████]: At that time, no.

9 Q [MR. SCHNEIDER]: Because it's a policy. Correct?

10 A [MR. ██████████]: Correct.

11 Q [MR. SCHNEIDER]: In the normal situation, where that policy,
12 whatever it is, wouldn't apply, you would have done that?

13 A [MR. ██████████]: Seeing as how it wasn't a normal situation,
14 you're probably correct.

15 Q [MR. SCHNEIDER]: Some other non-detainee situation; you hear
16 something in your interview that causes you to think he's a suspect
17 in a crime, you give him his rights?

18 A [MR. ██████████]: That's correct.

19 Q [MR. SCHNEIDER]: What was the policy that caused you not to
20 do it here, even though you didn't think he was a criminal?

21 A [MR. ██████████]: All I know is that when we first got here,
22 the directive that came down from our superiors is that based on the
23 situation that we were in at GTMO, that rights advisements would not

1 be given.

2 Q [MR. SCHNEIDER]: And that was in writing?

3 A [MR. [REDACTED]]: I don't know if I--I don't know if I ever saw
4 the written policy. I just know that was the policy at the time.

5 Q [MR. SCHNEIDER]: Mr. [REDACTED] indicated there was some
6 guidelines. Do you recall any guidelines?

7 A [MR. [REDACTED]]: I don't recall.

8 Q [MR. SCHNEIDER]: You knew he was a driver for bin Laden.
9 Correct?

10 A [MR. [REDACTED]]: Correct. Based on his admission.

11 Q [MR. SCHNEIDER]: But you didn't know of any information which
12 caused you to suspect him. Correct?

13 A [MR. [REDACTED]]: Again, I wasn't looking to try to develop
14 information trying to answer a criminal allegation against him. I
15 was trying to gather information intelligence about his activities
16 there, and what future information he might have that could help us
17 out.

18 Q [MR. SCHNEIDER]: Just three or four more questions. Was a
19 woman ever in the room when you interviewed him?

20 A [MR. [REDACTED]]: Yes.

21 [END OF PAGE]

22

23

1 Q [MR. SCHNEIDER]: Which occasion? You don't need to tell me
2 which one. Let me ask just you this question. Again, I'm trying to
3 be careful. Given Your Honor's ruling, I'm not sure I can even do
4 that. Was the woman in the room someone other than an FBI agent?

5 A [MR. [REDACTED]]: Yes.

6 Q [MR. SCHNEIDER]: An NCIS agent?

7 A [MR. [REDACTED]]: Yes.

8 Q [MR. SCHNEIDER]: Or anyone else identified by name?

9 A [MR. [REDACTED]]: That's correct.

10 Q [MR. SCHNEIDER]: Okay. You can't tell us anything about how
11 he was treated in the Panjshir Valley?

12 A [MR. [REDACTED]]: No, sir.

13 Q [MR. SCHNEIDER]: Do you have any clue as to what happened to
14 him between November 28 and December 28, 2001?

15 A [MR. [REDACTED]]: No, sir.

16 Q [MR. SCHNEIDER]: Who he was with?

17 A [MR. [REDACTED]]: Who he was with at that time after he was
18 captured?

19 Q [MR. SCHNEIDER]: Correct.

20 A [MR. [REDACTED]]: After he was captured?

21 Q [MR. SCHNEIDER]: Between November 28. He was captured on----

22 A [MR. [REDACTED]]: Okay.

23

1 Q [MR. SCHNEIDER]: Let's say the week after the 24th and the
2 end of December.

3 A [MR. ██████████]: No.

4 Q [MR. SCHNEIDER]: Do you know where he was taken?

5 A [MR. ██████████]: Based on the reports, I mean, just what was
6 in the reports. But we weren't asking that information.

7 Q [MR. SCHNEIDER]: Do you know how he was treated during that
8 time?

9 A [MR. ██████████]: He never told us one way or the other how he
10 was treated during that time.

11 Q [MR. SCHNEIDER]: And have you ever seen any written reports
12 submitted by any interrogator who was with any other government
13 agency?

14 A [MR. ██████████]: No. Concerning his treatment?

15 Q [MR. SCHNEIDER]: Concerning anything.

16 A [MR. ██████████]: No.

17 Q [MR. SCHNEIDER]: Okay. I apologize if I've already asked you
18 this. But with regard to the two periods of time, the time he was
19 captured and how he was treated before he was interviewed, and the
20 second, early summer of 2003. Can you personally tell us, do you
21 have any personal knowledge of how he was treated, whether he was
22 deprived of sleep, whether he was beaten, or anything like that?

23 A [MR. ██████████]: No.

1 Q [MR. SCHNEIDER]: That's out of your range?

2 A [MR. ██████████]: I dealt with just interviewing Mr. Hamdan.

3 CDC [MR. SCHNEIDER]: Thank you. No further questions.

4 CTC [MR. MURPHY]: No further questions either, Your Honor.

5 MJ [CAPT ALLRED]: Thank you for your testimony, Special Agent.

6 You may withdraw from the courtroom. And I guess he is done for the

7 day?

8 CTC [MR. MURPHY]: Yes, sir. We do want to keep all the agents

9 in their regular spot upstairs.

10 **[The witness was excused and withdrew from the courtroom.]**

11 MJ [CAPT ALLRED]: Very good.

12 CDC [MR. SCHNEIDER]: As far as we're concerned he can be

13 excused. But we have no objection with them being quarantined

14 upstairs.

15 MJ [CAPT ALLRED]: All right. Thank you. Off to lunch with

16 you. All right. We will be in recess until 1400.

17 **[The R.M.C. 803 session recessed at 1249, 16 July 2008.]**

18 **[The R.M.C. 803 session was called to order at 1413, 16 July 2008.]**

19 MJ [CAPT ALLRED]: Court is called to order.

20 Trial Counsel, please proceed.

21 CTC [MR. MURPHY]: Your Honor, the government is going to call

22 an individual that, with the consent of the parties and with

23 permission of the court, we're going to refer to as Witness Number

1 One.

2 MJ [CAPT ALLRED]: Okay.

3 CTC [MR. MURPHY]: I just got out of an 802 with defense counsel
4 and trial counsel and you, and I actually have not gotten them
5 gathered. If I could be excused for a brief moment or if the bailiff
6 can get them.

7 MJ [CAPT ALLRED]: He just needs to call for Witness Number One,
8 and that person will know who to answer to?

9 CTC [MR. MURPHY]: If you want me to go up, I would be happy to
10 bring them all down and have them standing by.

11 MJ [CAPT ALLRED]: I think they might be just as comfortable
12 back here in the jury deliberation room.

13 CTC [MR. MURPHY]: With your permission, I will do that.

14 MJ [CAPT ALLRED]: Sure. Witness Number One it is. And we also
15 agreed, I think, that somewhere in the record of trial we will file a
16 sealed document that identifies Witness Number One with a real name.
17 Will you prepare that, please? I don't know that I even need to sign
18 that. Why don't you just seal it up and give it to the court
19 reporter or whatever is appropriate.

20 CTC [MR. MURPHY]: Yes, sir.

21 MJ [CAPT ALLRED]: And let me know at the next session, if you
22 would, that that has been done and what number is assigned to it.

23 CTC [MR. MURPHY]: Yes, sir.

1 MJ [CAPT ALLRED]: Thank you.

2 CTC [MR. MURPHY]: All right. Witness Number One, if you could
3 approach the witness stand to be sworn.

4 **WITNESS ONE, was called as a witness for the prosecution, was sworn,**
5 **and testified as follows:**

6 CTC [MR. MURPHY]: Please be seated.

7 **[Witness One did as directed.]**

8 WIT [WIT ONE]: Thank you.

9 **DIRECT EXAMINATION**

10 **Question by the trial counsel:**

11 Q [MR. MURPHY]: And, as noted, you will be referred to as
12 Witness One.

13 Who are you employed by and what are your duties?

14 A [WIT ONE]: Special Agent with the Federal Bureau of
15 Investigation.

16 Q [MR. MURPHY]: And I'm going to skip past your background and
17 go right into some of the substance of the interviews.

18 Did you receive an assignment to interview the accused,
19 Salim Hamdan, also known as Saqr al Jadawi?

20 A [WIT ONE]: Yes, sir, I did.

21 Q [MR. MURPHY]: When did you get that assignment?

22 A [WIT ONE]: May of 2002.

23

1 Q [MR. MURPHY]: And in fact did you interview him in person,
2 with others?

3 A [WIT ONE]: Yes, sir, I did.

4 Q [MR. MURPHY]: Do you recognize Salim Hamdan in the courtroom
5 today?

6 A [WIT ONE]: Yes, sir, I do.

7 Q [MR. MURPHY]: And, if so, can you point to him and identify
8 him by an article of clothing he is wearing?

9 A [WIT ONE]: He's the gentleman seated in the middle of defense
10 table wearing a tan jacket.

11 CTC [MR. MURPHY]: May the record reflect that the witness has
12 properly identified the accused in this case?

13 MJ [CAPT ALLRED]: It may.

14 Q [MR. MURPHY]: During what time period did you interview the
15 accused?

16 A [WIT ONE]: May of 2002.

17 Q [MR. MURPHY]: And where did you interview him?

18 A [WIT ONE]: In Camp Delta, Guantanamo Bay.

19 Q [MR. MURPHY]: How many times did you interview him?

20 A [WIT ONE]: Approximately, five to six times.

21 Q [MR. MURPHY]: Describe for us the room or rooms where the
22 interviews took place.

23 A [WIT ONE]: The rooms were located in these long trailers,

1 which had about eight rooms in them. And each room was about 10 feet
2 by 12 feet.

3 Q [MR. MURPHY]: And were other people with you in the rooms?

4 A [WIT ONE]: Yes, they were.

5 Q [MR. MURPHY]: Who were they?

6 A [WIT ONE]: A CITF, Criminal Investigation Task Force partner,
7 a linguist, and then members of another government agency.

8 Q [MR. MURPHY]: Were you able to understand everything the
9 accused said to you?

10 A [WIT ONE]: No.

11 Q [MR. MURPHY]: Did you become able to understand?

12 A [WIT ONE]: Yes. Through the translator.

13 Q [MR. MURPHY]: Could you explain how you were able to become
14 familiar with what he was saying?

15 A [WIT ONE]: Through the translator.

16 Q [MR. MURPHY]: What were the seating arrangements in the room?

17 A [WIT ONE]: We would be seated, the CITF personnel and myself
18 and the linguist on one side of the table, as well as the
19 representatives from the other government agency. There would be
20 usually five of us on one side of the table, and then Mr. Hamdan on
21 the other side.

22

23

1 Q [MR. MURPHY]: How close were you and the others to Mr.
2 Hamdan?

3 A [WIT ONE]: Three or four feet.

4 Q [MR. MURPHY]: How would you describe the tone of the
5 interview with Mr. Hamdan?

6 A [WIT ONE]: Civil.

7 Q [MR. MURPHY]: How would you define the phrase "open-ended
8 questions"?

9 A [WIT ONE]: A questioning requiring--a question for which the
10 answer would be an explanation, not a yes or no or single word type
11 answer.

12 Q [MR. MURPHY]: Were those the types of questions you asked Mr.
13 Hamdan?

14 A [WIT ONE]: Yes.

15 Q [MR. MURPHY]: Did you or anyone else ever yell at Mr. Hamdan
16 or act in any manner you would consider threatening?

17 A [WIT ONE]: No.

18 Q [MR. MURPHY]: Did Mr. Hamdan ever tell you that he was
19 abused, mistreated, or tortured by anyone?

20 A [WIT ONE]: No.

21 Q [MR. MURPHY]: What would have happened if he made such a
22 report to you?

23 A [WIT ONE]: I would have memorialized it in a report of the

1 interview, and then reported it up our chain of command.

2 Q [MR. MURPHY]: And that did not become necessary here?

3 A [WIT ONE]: No.

4 Q [MR. MURPHY]: Did you have an opportunity to observe the
5 detention facility and the guards working at the facility?

6 A [WIT ONE]: A very limited opportunity. Only to the extent
7 when the guards brought him into the interview room, removed him from
8 the interview room. And then occasionally as we exited or entered
9 Camp Delta, we would see them bringing the detainees through what I
10 would equate to a sally port. But other than that, no other
11 exposure.

12 Q [MR. MURPHY]: Did you ever observe or hear any reports about
13 the guards or anyone else abusing this accused?

14 A [WIT ONE]: No.

15 Q [MR. MURPHY]: Did Mr. Hamdan tell you he was ever forced to
16 speak against his will?

17 A [WIT ONE]: No.

18 Q [MR. MURPHY]: To make any false information up?

19 A [WIT ONE]: No.

20 Q [MR. MURPHY]: Did you provide him with an opportunity to have
21 food and drink?

22 A [WIT ONE]: Yes.

23

1 Q [MR. MURPHY]: During the interviews, did he indicate a
2 willingness to talk to you?

3 A [WIT ONE]: Yes.

4 Q [MR. MURPHY]: Did you provide him any rights advisement
5 warnings, such as Article 31 warnings or Miranda type warnings?

6 A [WIT ONE]: No.

7 Q [MR. MURPHY]: Why was that?

8 A [WIT ONE]: It was our policy to not advise rights.

9 Q [MR. MURPHY]: Was it clear to you that Mr. Hamdan could speak
10 or not speak with you and the others during these interviews?

11 A [WIT ONE]: Yes, it was.

12 Q [MR. MURPHY]: And how was that made clear to you?

13 A [WIT ONE]: By whether or not he did in fact speak to us.

14 Q [MR. MURPHY]: How long did the interviews last?

15 A [WIT ONE]: Between an hour to two hours.

16 Q [MR. MURPHY]: Each?

17 A [WIT ONE]: Yes. Each.

18 Q [MR. MURPHY]: Was it important to you to get reliable and
19 accurate information?

20 A [WIT ONE]: Yes.

21 Q [MR. MURPHY]: And why was that?

22 A [WIT ONE]: It wouldn't be useful otherwise.

23

1 Q [MR. MURPHY]: Did you prepare reports known as FBI 302s in
2 connection with your interviews?

3 A [WIT ONE]: Yes, I did.

4 Q [MR. MURPHY]: And did they summarize the interviews that you
5 had with Mr. Hamdan?

6 A [WIT ONE]: Yes.

7 Q [MR. MURPHY]: Did you review those reports prior to your
8 testimony today?

9 A [WIT ONE]: Yes.

10 Q [MR. MURPHY]: Now, I'm going to read to you a series of
11 allegations, and then I'm going to ask you after reading through all
12 of them if any of them sound true to you, or if you received any
13 reports or you personally observed any of the following:

14 Allegations that personal property was taken away from the
15 accused in order to facilitate the interviews.

16 Allegations that medical care was either provided or
17 withheld to assist with the interviews.

18 Allegations that a female interrogator touched him, and
19 touched him in the groin area.

20 Soldiers or others placed him in solitary confinement to
21 facilitate the interview process.

22 Allegations at Bagram where a soldier put his knee in back
23 of Mr. Hamdan's back.

1 And, allegations that agents, including agents at Kandahar,
2 specifically Agents [REDACTED] and [REDACTED], threatened to kill him, or
3 displayed a gun to him in a threatening manner.

4 Is anything of that something you heard about or know
5 about?

6 A [WIT ONE]: No. I've heard of none of that.

7 Q [MR. MURPHY]: Did he speak to you at all about local Afghani
8 forces killing an Arab, and as a result he felt threatened by U.S.
9 forces or agents?

10 A [WIT ONE]: No. He spoke of an Arab being killed when he was
11 captured, but only in the context of giving us an account of what
12 occurred on that day.

13 Q [MR. MURPHY]: Did he in any way relate to you that, because
14 he had that knowledge, he personally felt threatened by U.S. forces
15 or by special agents?

16 A [WIT ONE]: No.

17 Q [MR. MURPHY]: Did he say anything to you about making up a
18 false story about transporting weapons?

19 A [WIT ONE]: No.

20 Q [MR. MURPHY]: Did he say anything to you about a hood being
21 placed over his head, and that caused him to believe he would be
22 killed?

23 A [WIT ONE]: No.

1 Q [MR. MURPHY]: Did he say anything about detainees at Bagram
2 being beaten, and that, as a result of that, his own survival
3 depended on cooperation with U.S. officials?

4 A [WIT ONE]: No.

5 Q [MR. MURPHY]: Did he say anything to you about detainees
6 beaten and left lying on a tarmac anywhere in extreme cold, and that
7 this caused him to be at the mercy of U.S. agents?

8 A [WIT ONE]: No.

9 Q [MR. MURPHY]: Do you know anything about, or did Mr. Hamdan
10 admit to you, anything about being moved to a solitary confinement
11 prior to interrogations?

12 A [WIT ONE]: No.

13 Q [MR. MURPHY]: Can you tell us briefly the key points that Mr.
14 Hamdan told you that was relevant to your investigation?

15 A [WIT ONE]: Yes. He told us primarily about his status as a
16 bodyguard--I'm sorry, as a driver for Osama bin Laden. He identified
17 a weapons arsenal outside of Kandahar. And he spoke or admitted to
18 delivering requests for weapons to and from that same arsenal.

19 Q [MR. MURPHY]: And could you at trial provide even greater
20 detail about specific admissions that he made when you interviewed
21 him?

22 A [WIT ONE]: Yes, I would be able to.

23

1 Q [MR. MURPHY]: Finally, did you have a dispute with the FBI
2 that led to a personnel action?

3 A [WIT ONE]: Yes.

4 Q [MR. MURPHY]: Please tell us what happened.

5 A [WIT ONE]: Well, I was involved in a disciplinary action for
6 using a bureau vehicle to transport my infant daughter home from her
7 daycare center on a couple of occasions, where my wife through
8 exigent circumstances on her job was unable to take my daughter home.

9 Upon being interviewed, I gave the interviewer an estimate
10 of how many times I had done it. That interviewer conducted an
11 investigation afterwards, found a discrepancy in the amount of times
12 that I had in fact picked her up. And when I told him, I gave him an
13 approximation, I didn't give him an exact number. But the way in
14 which the statement was written initially led the FBI to believe that
15 I had admitted to, let's say, three times and only three times. But
16 that's not what was said in the interview and that is not actually,
17 if you read the statement carefully, how the statement was written.
18 But it took an action with the merit systems protection board to----

19 Q [MR. MURPHY]: And what happened as a result of your MSPB
20 finding?

21 A [WIT ONE]: I was reinstated.

22

23

1 Q [MR. MURPHY]: And you are aware that I personally handed to
2 the defense a copy of the MSPB finding in this case?

3 A [WIT ONE]: Yes, I'm aware of that.

4 Q [MR. MURPHY]: You've read that previously. Is that right?

5 A [WIT ONE]: I have.

6 Q [MR. MURPHY]: And that sets out the facts of the case as well
7 as the findings of the MSPB?

8 A [WIT ONE]: Yes, sir.

9 Q [MR. MURPHY]: And did that incident in any way affect your
10 testimony here today or your work with the FBI?

11 A [WIT ONE]: None whatsoever.

12 CTC [MR. MURPHY]: Your Honor, we would tender the witness.

13 MJ [CAPT ALLRED]: Very good. Thank you.

14 **CROSS-EXAMINATION**

15 **Question by defense counsel:**

16 Q [MR. SWIFT]: Good afternoon. My name is Charlie Swift, and I
17 represent Mr. Hamdan.

18 A [WIT ONE]: Good afternoon.

19 Q [MR. SWIFT]: You stated that you participated in interviews
20 with my client here in Guantanamo in May of 2002. Is that correct?

21 A [WIT ONE]: Yes, sir.

1 Q [MR. SWIFT]: Is that the only time that you were in
2 Guantanamo was for those interviews?

3 A [WIT ONE]: No, sir. I was in Guantanamo in May through June.
4 And I was back for another tour I believe--I don't have the exact
5 dates, but it was later in the summer, early fall.

6 Q [MR. SWIFT]: You were here on two different occasions, May
7 through June, and July or August, something like that?

8 A [WIT ONE]: August, September. Yes, sir.

9 Q [MR. SWIFT]: About a total of four months. Would that be
10 fair?

11 A [WIT ONE]: I think it actually added up to 90 days; 45 for
12 each trip.

13 Q [MR. SWIFT]: Fair enough. Other than the FBI 302 notes and
14 the notes reports that we've received, did you interview him on any
15 occasions in July or August?

16 A [WIT ONE]: I actually don't recall. It is quite possible
17 that I did, and I seem to recall it, but I was not given any copies
18 of 302s to help refresh my memory. So I can't say for certain.

19 Q [MR. SWIFT]: So without those notes, you can't remember it.
20 You say it's familiar, but you're not sure?

21 A [WIT ONE]: Correct.

22

23

1 Q [MR. SWIFT]: Now, you stated that during these interviews you
2 used translators.

3 A [WIT ONE]: Yes, sir.

4 Q [MR. SWIFT]: Is that correct?

5 A [WIT ONE]: Yes.

6 Q [MR. SWIFT]: What nationality was the translator?

7 A [WIT ONE]: Well, I can't attest to all the nationalities of
8 translators; I did use more than one. But the one who was there for
9 the preponderance of the interviews that conducted of Mr. Hamdan, he
10 was, if I'm not mistaken, Palestinian.

11 Q [MR. SWIFT]: Okay. What were his qualifications?

12 A [WIT ONE]: I honestly don't know. He was an employee of
13 either Worldwide or Titan, and his qualifications I guess were vetted
14 by those organizations. And he met those--I don't know what their
15 standards are for their linguists.

16 Q [MR. SWIFT]: And as far as whether his translations were
17 completely accurate or not, you wouldn't have a way to know his level
18 of qualification?

19 A [WIT ONE]: Correct. I am not an Arabic speaker. But he was
20 one of the most sought after linguists down here, so they gave me
21 confidence in his abilities.

22

23

1 Q [MR. SWIFT]: Now, before interviewing Mr. Hamdan, did you
2 review his file or notes or any other 302s that were prepared on him?

3 A [WIT ONE]: Yes, sir.

4 Q [MR. SWIFT]: Based on reviewing them, did you consider him a
5 criminal suspect?

6 A [WIT ONE]: No, sir.

7 Q [MR. SWIFT]: Why not?

8 A [WIT ONE]: I considered him a valuable source of military
9 intelligence.

10 Q [MR. SWIFT]: Okay. So your purpose wasn't to develop a
11 criminal case at that time?

12 A [WIT ONE]: No. That was not my purpose, no, sir.

13 Q [MR. SWIFT]: So under no circumstances, had Mr. Hamdan been
14 sitting in Miami and not Guantanamo when you went in and talked to
15 him, you wouldn't have read him his rights.

16 A [WIT ONE]: Given the policy that I was advised to follow; if
17 the policy said, in Miami, do not advise him of his rights, I would
18 not have advised him of his rights.

19 Q [MR. SWIFT]: There's no policy. You just walked in, Mr.
20 Hamdan's there. On your own independent judgment, given that he is
21 an intelligence source, not a criminal suspect, would you have read
22 his rights to him on that particular time?

23 A [WIT ONE]: Given he was an intelligence source and not a

1 criminal subject, I would not have given him his rights.

2 Q [MR. SWIFT]: And you considered him to be an intelligence
3 source?

4 A [WIT ONE]: Yes, sir.

5 Q [MR. SWIFT]: Now, you've been asked about different
6 occurrences that occurred in Guantanamo Bay, whether or whether or
7 not they happened. You testified that you had not actually been
8 inside the detention camps. Is that true?

9 A [WIT ONE]: I had been in to the extent they allowed us to go
10 into Delta to the interview rooms, but I had not been anywhere near
11 where the detainees were housed.

12 Q [MR. SWIFT]: Were you aware of what level of treatment Mr.
13 Hamdan was receiving during the time of his interviews with you?

14 A [WIT ONE]: No, sir, I wasn't.

15 Q [MR. SWIFT]: Were military interrogators also involved or
16 present during your interrogations?

17 A [WIT ONE]: Yes, sir.

18 Q [MR. SWIFT]: So, now, were the military interrogators under
19 your control?

20 A [WIT ONE]: No, sir.

21 [END OF PAGE]

22

23

1 Q [MR. SWIFT]: Were you aware of whether military
2 interrogations were going on of Mr. Hamdan at the same time that you
3 were asking him questions?

4 A [WIT ONE]: Well, there was only one interview going on when I
5 was asking him questions.

6 Q [MR. SWIFT]: I phrased that question poorly. I'll do it
7 again.

8 During the period in May, when you sat down and questioned
9 Mr. Hamdan on four occasions, were you aware of whether military
10 interrogations were going on during that same period of time? In
11 other words, Mr. Hamdan, not as the same interview, but he could be
12 going to military interrogations at the same time.

13 A [WIT ONE]: Well, sir, I assume there were. There were
14 occasions--and this happened with many of the detainees of the many
15 that I interviewed, where they were not available to us when we
16 scheduled an interview. We were preempted by another agency. So I'm
17 assuming that they were interviewing.

18 Q [MR. SWIFT]: Were you ever preempted with Mr. Hamdan?

19 A [WIT ONE]: I can't recall whether I was or wasn't.

20 Q [MR. SWIFT]: It is possible?

21 A [WIT ONE]: It is possible. Yes, sir.

22 CDC [MR. SWIFT]: I don't have any other questions, Your Honor.

23 CTC [MR. MURPHY]: Nothing further, Your Honor.

1 MJ [CAPT ALLRED]: Okay. Thank you.

2 Q [MR. SWIFT]: Who is [REDACTED]?

3 A [WIT ONE]: [REDACTED] is a special agent with the Naval
4 Criminal Investigative Service.

5 Q [MR. SWIFT]: And he was present during all of your
6 interviews?

7 A [WIT ONE]: No, sir. He was present for several of them, but
8 not all of them.

9 CDC [MR. SWIFT]: Thank you.

10 CTC [MR. MURPHY]: Your Honor, we have nothing further, and ask
11 that the witness remain in the building throughout the day.

12 MJ [CAPT ALLRED]: Very good. Thank you very much.

13 **[Witness One was temporarily excused and withdrew from the**
14 **courtroom.]**

15 CTC [MR. MURPHY]: Your Honor, all of our witnesses now are in
16 the jury deliberation room. So if I could ask Witness Number One to
17 just ask Special Agent [REDACTED] to please come in.

18 **[The witness entered the courtroom.]**

19 CTC [MR. MURPHY]: Special [REDACTED], if you could approach
20 the witness stand to be sworn, face me, and raise your right hand.

21 **[END OF PAGE]**

1 [REDACTED], JR., Civilian, was called as a witness for the
2 prosecution, was sworn and testified as follows:

3 DIRECT EXAMINATION

4 Question by the trial counsel:

5 Q [MR. MURPHY]: Please be seated.

6 [The witness did as directed.]

7 Q [MR. MURPHY]: Could you state your full name and spell your
8 last name for the record.

9 A [MR. [REDACTED]]: [REDACTED], [REDACTED] [REDACTED].

10 Q [MR. MURPHY]: Who are you employed by, and what are your
11 duties?

12 A [MR. [REDACTED]]: I'm employed by the FBI. I'm currently the
13 supervisor in the Allentown office of the FBI.

14 Q [MR. MURPHY]: All right. In the interest of efficiency, I'm
15 going to skip through your training and I'm going to go right into
16 some of the interview aspects.

17 Did you receive an assignment to interview Salim Hamdan,
18 also known as Saqr al Jadawi?

19 A [MR. [REDACTED]]: I did.

20 Q [MR. MURPHY]: When did you get that assignment?

21 A [MR. [REDACTED]]: I don't recall when the assignment was given to
22 me, but I believe I arrived in GTMO for the interview--well, the
23 interview began June 26th through July 9th.

1 Q [MR. MURPHY]: Did you in fact interview Salim Hamdan, in
2 person, with others?

3 A [MR. [REDACTED]]: I did.

4 Q [MR. MURPHY]: Do you recognize Salim Hamdan in the courtroom
5 today?

6 A [MR. [REDACTED]]: I do.

7 Q [MR. MURPHY]: If so, could you point to him and identify an
8 article of clothing he is wearing?

9 A [MR. [REDACTED]]: Mr. Hamdan is sitting almost directly in front
10 of me wearing a light tan sports jacket.

11 CTC [MR. MURPHY]: Your Honor, may the record reflect that the
12 witness has properly identified the accused in this case?

13 MJ [CAPT ALLRED]: Very well.

14 Q [MR. MURPHY]: During what time period did you interview the
15 accused?

16 A [MR. [REDACTED]]: I believe it was June 26th through July 9th of
17 2002.

18 Q [MR. MURPHY]: Where did you interview him?

19 A [MR. [REDACTED]]: It was here at Guantanamo Bay.

20 Q [MR. MURPHY]: And approximately how many times did you
21 interview him?

22 A [MR. [REDACTED]]: I believe it was 12 to 13 times.
23

1 Q [MR. MURPHY]: Could you describe in some detail the room or
2 rooms where these interviews took place?

3 A [MR. ██████]: The interview rooms were in a trailer. They
4 were approximately 12 by 10 or 8 feet. An air conditioner was in the
5 room, a one-way mirror, a folding table, and usually three folding
6 chairs as well, I believe.

7 Q [MR. MURPHY]: And were there other people in the interview
8 rooms with you?

9 A [MR. ██████]: Yes, sir, there were.

10 Q [MR. MURPHY]: Who were they?

11 A [MR. ██████]: Special Agent ██████ and Special Agent
12 ██████.

13 Q [MR. MURPHY]: And you didn't need a translator in that
14 session. Is that right?

15 A [MR. ██████]: I needed a translator.

16 Q [MR. MURPHY]: Right. Another person to be a translator, I
17 should say.

18 A [MR. ██████]: No. Special Agent ██████ and Special Agent
19 ██████ were both native Arabic speakers.

20 Q [MR. MURPHY]: The interview was conducted in Arabic?

21 A [MR. ██████]: That's correct.

22

23

1 Q [MR. MURPHY]: Through the use of the native Arabic speaking
2 agents, were you able to understand everything that Salim Hamdan said
3 during the interviews?

4 A [MR. ██████]: Most of what was said was translated for me.
5 There would be some aspects that, whether Agent ██████ or Agent
6 ██████ considered nonpertinent that probably would not be
7 translated to me.

8 Q [MR. MURPHY]: Is it your understanding that all of the
9 pertinent material was translated to you?

10 A [MR. ██████]: That was my understanding. Yes.

11 Q [MR. MURPHY]: How close were you and the other investigating
12 agents physically to Mr. Hamdan during these interviews?

13 A [MR. ██████]: During most of the interviews, we sat probably
14 the length--or the width, excuse me, of the folding table apart. Mr.
15 Hamdan would be on one side of the table, Special Agents ██████,
16 ██████, and myself would be on the other side of the table. But
17 there were times where I believe particularly Agent ██████ would get
18 closer. And I want to say that at least on one occasion I think we
19 sat on the floor together.

20 Q [MR. MURPHY]: Okay. I'm going to ask you if you could define
21 the phrase "open-ended questions." And, using your definition, are
22 those the type of questions you asked Mr. Hamdan?

23 A [MR. ██████]: My definition of an open-ended question would

1 be a question that does not call for a simple yes or no answer, but
2 would be the type of question that would elicit a response, that
3 would call for an explanation. And that's the type of questions that
4 we would employ for the most part with Mr. Hamdan, trying to draw out
5 from him in his own words information that we would want to elicit
6 from him.

7 Q [MR. MURPHY]: Did you or anyone else interviewing him ever
8 yell at Mr. Hamdan or act in any manner that you would consider
9 threatening?

10 A [MR. [REDACTED]]: I don't believe we ever did.

11 Q [MR. MURPHY]: At any time during these interviews, did the
12 accused ever tell you that he was abused, mistreated, or tortured by
13 anyone at any time?

14 A [MR. [REDACTED]]: Mr. Hamdan did not tell me that. No.

15 Q [MR. MURPHY]: All right. Now, you provided some information
16 just a short while ago about a discussion you had with another agent
17 that may bear on this question, so give a full answer. And we
18 discussed that we would bring this out during your testimony. Can
19 you elaborate on this information that bears on this question to some
20 degree?

21 A [MR. [REDACTED]]: It was either--it was this afternoon I spoke
22 with Special Agent [REDACTED]. And one of the issues as we were
23 discussing was, much that everyone was discussing, was whether or not

1 Mr. Hamdan had ever stated that he had been abused, beaten, anything
2 like that. And Special Agent [REDACTED] indicated that during our
3 interview he recalled that Mr. Hamdan had told him that he had been
4 beaten at Bagram.

5 I did not have that recollection. I looked at my notes. I
6 re-reviewed my 302s--my 302, singular, looking for that. I did not
7 see that anywhere, and I do not recall that Mr. Hamdan ever stated or
8 it was ever translated to me that Mr. Hamdan had stated that he had
9 been beaten at Bagram.

10 I inquired further of Special Agent [REDACTED] were there
11 any more details that he could share with me on this. He explained
12 that that was all that he had on it. It was, Mr. Hamdan had said he
13 had been beaten at Bagram. There were no further details.

14 Q [MR. MURPHY]: According to Agent [REDACTED], Mr. Hamdan didn't
15 indicate whether this was U.S. forces or someone else?

16 A [MR. [REDACTED]]: Special Agent [REDACTED] had no further details.

17 Q [MR. MURPHY]: I guess the only detail is that he made an
18 allegation--or the only detail is Agent [REDACTED] told you that Mr.
19 Hamdan said, "I was beaten at Bagram," and that's the extent to which
20 you know about. Is that?

21 A [MR. [REDACTED]]: That is the extent. That is the extent.

1 Q [MR. MURPHY]: Okay. What would you have done if the accused
2 had made any reports to you of abuse or mistreatment?

3 A [MR. ██████]: I would like to think that had he made an
4 allegation of abuse or mistreatment, that I would have looked into it
5 or at least reported it to someone.

6 Q [MR. MURPHY]: All right. Do you believe that you in fact
7 would have done that?

8 A [MR. ██████]: I believe I would.

9 Q [MR. MURPHY]: Did you have an opportunity to observe the
10 accused's detention facility and the guards working at the detention
11 facility?

12 A [MR. ██████]: I did not see inside the prison facility. Only
13 to the extent where I would walk in and go to the interview room.
14 And the only interaction I saw with the detainees would be when they
15 brought a prisoner out into the interview room. So that was the
16 limit of my witnessing the interaction.

17 Q [MR. MURPHY]: And what you saw, did you see any evidence of
18 abuse or mistreatment?

19 A [MR. ██████]: I did not.

20 Q [MR. MURPHY]: Did Salim Hamdan ever tell you that he was
21 forced to speak against his will, make up information, or make up
22 information for any reason?

23 A [MR. ██████]: He did not.

1 Q [MR. MURPHY]: Did you provide him an opportunity to drink and
2 eat during the interview sessions?

3 A [MR. [REDACTED]]: Yes, we did.

4 Q [MR. MURPHY]: Did he indicate a willingness to speak?

5 A [MR. [REDACTED]]: Yes, he did.

6 Q [MR. MURPHY]: And how did he express this willingness?

7 A [MR. [REDACTED]]: He talked to us at great length over at least
8 12 or 13 sessions.

9 Q [MR. MURPHY]: During your interviews, at any time did you
10 give him any rights warnings such as Article 13 rights warnings under
11 the UCMJ or Miranda-type warnings?

12 A [MR. [REDACTED]]: We did not.

13 Q [MR. MURPHY]: Why was that?

14 A [MR. [REDACTED]]: As we understood it, or at least as I
15 understood it pertaining to interviewing the detainees here at GTMO,
16 the policy was rights-warnings would not be given.

17 Q [MR. MURPHY]: Was it clear to you that Mr. Hamdan was free to
18 either speak to you or not to speak to you during these interviews?

19 A [MR. [REDACTED]]: Yes. He was free to not speak to us if he so
20 chose.

21 Q [MR. MURPHY]: And how was that clear to you?

22 A [MR. [REDACTED]]: Well, at least on one occasion I recall, he had
23 complained that he was in solitary--he was placed in solitary

1 confinement. And this was probably--this was well into it, I think
2 around July 8th. This was news to us. He said he didn't want to
3 talk, so we agreed not to talk to him and went to investigate why he
4 was placed in solitary confinement. We talked to the military
5 authorities. And I believe what they told us was that it was a part
6 of a standard rotation. And I think we went and we requested again
7 to speak to Mr. Hamdan later that day; told him that we had nothing
8 to do with that, it wasn't solitary confinement. And I think for
9 that day we gave him some Arabic literature and spoke a little bit
10 more. And he understood what we were saying, that we had nothing to
11 do with that, and agreed to talk to us again.

12 Q [MR. MURPHY]: All right. And during the entire course of
13 these interviews, you never leveraged or used in any way confinement
14 conditions and putting solitary confinement conditions to build that
15 into the interrogation program in any way?

16 A [MR. [REDACTED]]: We did not. We had nothing to do with those
17 conditions. Somewhat--you know, I wish we could have had input into
18 that. It was made pretty clear to us that we could interview, but
19 those conditions would be dictated by the military.

20 Q [MR. MURPHY]: And certainly not dictated by the FBI
21 interviewers?

22 A [MR. [REDACTED]]: That was made pretty clear to me, that I would
23 not be dictating that.

1 Q [MR. MURPHY]: Was it important to you that the information
2 you received from Mr. Hamdan was both reliable and accurate?

3 A [MR. [REDACTED]]: Yes, it was.

4 Q [MR. MURPHY]: Why is that?

5 A [MR. [REDACTED]]: Because some day soon, that--and I try to take
6 this with all the interviews. That one day I'll be called to court
7 to testify on what it is that I put down on the paper to record my
8 interview.

9 Q [MR. MURPHY]: You turned all of the summaries of your
10 interviews into an FBI Form 302. Is that correct?

11 A [MR. [REDACTED]]: That is correct.

12 Q [MR. MURPHY]: And that document is not a transcript of the
13 interview; it's a summary of your interview results. Is that right?

14 A [MR. [REDACTED]]: That is correct.

15 Q [MR. MURPHY]: And have you had a chance to review that FBI
16 302 prior to your testimony today?

17 A [MR. [REDACTED]]: Yes, I have.

18 [END OF PAGE]

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23

1 Q [MR. MURPHY]: All right. I want to go through with you
2 briefly a list, and I'm going to go through the complete list and
3 then ask you at the end whether you've heard or have any knowledge of
4 this, keeping in mind the one piece of information you gave us of
5 Bagram coming from Agent [REDACTED]. Let me go through the list of
6 allegations that are out there regarding Mr. Hamdan.

7 That personal property was taken away from him in order to
8 facilitate interviews by interviewers. That medical services was
9 given or not given depending on the success of the interviews. That
10 interviewers abused Mr. Hamdan, including sexual abuse, allegations
11 of touching him in the groin area. That he was placed in solitary
12 confinement at the direction or request of interviewers to facilitate
13 the interviews. That he was abused at Bagram by having a soldier put
14 his knee in the back of Mr. Hamdan. That he was threatened to be
15 killed, and specifically the allegation involves his time at Kandahar
16 where Agents [REDACTED] and [REDACTED] were present. And, that a gun was
17 shown to Mr. Hamdan in a threatening manner to intimidate him into
18 making any admissions.

19 What would you say about all of those allegations?

20 A [MR. [REDACTED]]: Well, exclusive of what Agent [REDACTED] had
21 told me this afternoon or this morning, I had not heard any of those
22 allegations from Mr. Hamdan.

23

1 Q [MR. MURPHY]: All right. There are other allegations. I
2 would ask you to say if you have any knowledge about from any source:
3 That an Afghani local force member shot and killed an Arab, and that
4 as a result of Mr. Hamdan's seeing this he felt threatened by U.S.
5 forces and special agents. I'll run through this whole list, and ask
6 you to comment at the end.

7 That Mr. Hamdan made up false stories for federal agents
8 about transporting weapons. That someone put a hood over the head of
9 Mr. Hamdan, and that made him believe that he would be killed. That
10 Mr. Hamdan alleges seeing a detainee beaten in Bagram, and that as a
11 result his survival depended on cooperating with U.S. officials. And
12 that he alleges seeing other detainees beaten and lying on the tarmac
13 somewhere, or anywhere, in extreme cold weather, and that this caused
14 him to be at the mercy of U.S. forces.

15 Can you comment on knowledge of any of those allegations?

16 A [MR. ██████]: I cannot.

17 Q [MR. MURPHY]: Mr. Hamdan didn't raise any of those with you?

18 A [MR. ██████]: He did not.

19 Q [MR. MURPHY]: Can you provide us in summary fashion, what was
20 a fairly lengthy interview you had with him over time, some of the
21 key admissions that he made to you?

22 A [MR. ██████]: Mr. Hamdan stated that he was bin Laden's
23 driver, part of the security convoy for bin Laden. He transported

1 Osama bin Laden prior to and after the embassy bombings. When they
2 evacuated, they came from Kandahar. Just prior to and after 9/11,
3 also drove Mr. Bin Laden or Osama bin Laden and his son Uthman on a
4 route throughout Afghanistan. He knew of the security details
5 related to bin Laden. He knew that Nashiri was involved in the USS
6 COLE attack. I'm trying to think of some of the other details.

7 He was aware, I believe he was aware that bin Laden was
8 involved in the embassy bombings. He knew that bin Laden was
9 involved in the 9/11 attack. He knew of the fatwa against the
10 Northern Alliance, had heard about the fatwa against the U.S. but not
11 actually seen it.

12 Q [MR. MURPHY]: That's good. Certainly, you could provide even
13 greater detail about specific admissions that he made at the time of
14 the trial. Is that correct?

15 A [MR. [REDACTED]]: I believe so.

16 Q [MR. MURPHY]: All right. Now, in order for you to document
17 the detail of the admissions made by this accused, did you help
18 create two maps that provide significant details of the admissions
19 the accused made to you regarding, one, the escape of Osama bin Laden
20 after the bombings; and, two, the escape of Osama bin Laden following
21 9/11?

22 A [MR. [REDACTED]]: Yes.

23 CTC [MR. MURPHY]: Your Honor, we have two unclassified maps of

1 Afghanistan, with boxes that reflect the work of Agent [REDACTED] and his
2 302. They're both unclassified.

3 MJ [CAPT ALLRED]: I believe I've seen them before when he
4 testified in December.

5 CTC [MR. MURPHY]: You saw one.

6 MJ [CAPT ALLRED]: Okay. Bring it on.

7 CTC [MR. MURPHY]: Should I show first to the military judge?

8 MJ [CAPT ALLRED]: Yes. Let's do that, as a matter of practice.

9 CTC [MR. MURPHY]: It's my understanding this will be Appellate
10 Exhibits 257 and 258. We can show both to the military judge first.

11 MJ [CAPT ALLRED]: Okay. These will be Appellate Exhibits 258
12 and 259. Is that what you said? All right.

13 CTC [MR. MURPHY]: Your Honor, I would ask that they both be
14 admitted at this time, and ask permission for the Court to show the
15 first now identified as Appellate Exhibit 258.

16 DEFENSE: No objection.

17 MJ [CAPT ALLRED]: Very well. Without objection.

18 **[APPELLATE EXHIBITS 258 AND 259.]**

19 CTC [MR. MURPHY]: I will show it to all.

20 MJ [CAPT ALLRED]: You may.

21 Q [MR. MURPHY]: All right. Agent [REDACTED], I show you what is
22 marked as Appellate Exhibit 258. Do you recognize that map?

23 A [MR. [REDACTED]]: Yes, I do.

1 Q [MR. MURPHY]: And does this map provide the details that you
2 obtained directly from Mr. Hamdan regarding his activity and Osama
3 bin Laden's activity following the bombing of the East African
4 embassies?

5 A [MR. ██████]: Yes.

6 Q [MR. MURPHY]: Utilizing this map as an aid, can you provide
7 for us a summary of the admissions Mr. Hamdan made regarding what
8 happened with him and Osama bin Laden after the events of the East
9 Africa bombing.

10 A [MR. ██████]: Just prior to the East Africa bombings, the
11 convoy, Osama bin Laden and several others, excuse me, departed the
12 compound in Kandahar. They actually spent the day before, I believe,
13 up to the first night after the embassy attack in Kandahar. And then
14 the convoy went to Kabul where they stayed for about 10 days.

15 Q [MR. MURPHY]: When you say "they," who are you referring to?

16 A [MR. ██████]: There were several individuals in the compound.
17 But Osama bin Laden, several of the body guards, Mr. Hamdan. So
18 there were quite a few people that were actually in the convoy that
19 went to Kabul.

20 Q [MR. MURPHY]: All right. And there's a third box there.
21 Could you take us there?

22 A [MR. ██████]: After spending approximately 10 days in Kabul,
23 the convoy returned to Kandahar.

1 Q [MR. MURPHY]: All right. And that's a summary of his
2 admission of his activities following the East Africa bombing?

3 A [MR. ██████████]: Unless you want me to get into why he felt that
4 they needed to move out of Kandahar.

5 Q [MR. MURPHY]: Do tell us that.

6 A [MR. ██████████]: Mr. Hamdan explained that they understood--that
7 he understood that an operation was about to take place, and this was
8 going to be the first time that Osama bin Laden was going to be going
9 up against the Americans, sort of in a face-to-face, if you will,
10 attack. So they were unsure of what the U.S. response would be, so
11 they decided that they needed to evacuate the compound in Kandahar.
12 And this was what Osama bin Laden had come up with.

13 Q [MR. MURPHY]: All right. Let's turn to the next appellate
14 exhibit, with the permission of the Court. And that's 259. And if
15 we could display 259 to all at this time.

16 All right. Special Agent ██████████, do you see what is marked
17 as Appellate Exhibit 259?

18 A [MR. ██████████]: I do.

19 Q [MR. MURPHY]: And what is that?

20 A [MR. ██████████]: That is a map of Afghanistan depicting the
21 route the UBL convoy--or at least the small UBL convoy that Mr.
22 Hamdan was driving Osama bin Laden and his son Othman in just prior
23 to and after 9/11.

1 Q [MR. MURPHY]: All right. And did you assist in the
2 preparation of this, the map with boxes?

3 A [MR. ██████████]: I did.

4 Q [MR. MURPHY]: All right. Can you utilize this map and the
5 information you have there to assist us in explaining the admissions
6 that Mr. Hamdan made to you regarding his activity and Osama bin
7 Laden's activity immediately following the events of 9/11? And I
8 have a box that's blocking part of mine. Do you have that as well?
9 Perhaps we could use the screen immediately behind you that has no
10 box in it. And if you could utilize that map to explain the
11 admissions of Mr. Hamdan.

12 A [MR. ██████████]: Just prior to 9/11, approximately seven to ten
13 days prior to 9/11 they're told that they will be evacuating the
14 compound.

15 From there, the group travels to Kabul. And this would
16 have been, based upon what Mr. Hamdan is saying, sometime around
17 September 1st, September 4th, they stay at Muhammed Salah's house.
18 From there, they move on to another guest house in Kabul, where the
19 Emir is a Saudi by the name of Anas. They stay there approximately
20 until September 9th.

21 From there, they move on to Logar, where they stay for a
22 week. And this is just prior to, just after 9/11. Logar is
23 described as a military camp that had numerous tunnels.

1 From Logar, they travel on to Osama bin Laden's house at
2 the Star of Jihad training camp, and they stay there for
3 approximately a week. Then they head back to Kabul, where they spend
4 approximately two to three days. Then they travel down to the coast
5 area for another two to three days. Then they go back to Kabul. And
6 now we're looking at the early part of October, October 3rd, October
7 4th, that time period. And then from there, they go back to
8 Kandahar, where he spends another one to two days before he claimed
9 that he needs to leave bin Laden to get his wife out of Afghanistan.

10 Q [MR. MURPHY]: All right. And this is a summary of the events
11 surrounding 9/11 that Mr. Hamdan reported directly to you?

12 A [MR. ████████]: That is correct.

13 Q [MR. MURPHY]: And the significant details surrounding that
14 admission is reflected in this document?

15 A [MR. ████████]: It is.

16 CTC [MR. MURPHY]: Your Honor, I would tender the witness at
17 this time.

18 MJ [CAPT ALLRED]: Very good. Thank you.

19 CDC [MR. SCHNEIDER]: Your Honor, I don't know if you intend to
20 take a recess this afternoon. I'm informed that Mr. Hamdan wants to.

21 MJ [CAPT ALLRED]: Well, in that case I think it's time for a
22 recess. Ten or 15 minutes. Very good. Let's try to come back in 15
23 minutes. Shall we?

1 [The R.M.C. 803 session recessed at 1503, 16 July 2008.]

2 [The R.M.C. 803 session was called to order at 1602, 16 July 2008.]

3 MJ [CAPT ALLRED]: Court is called to order.

4 CDC [MR. SCHNEIDER]: I apologize for the lengthy recess.

5 MJ [CAPT ALLRED]: Not at all.

6 **CROSS-EXAMINATION**

7 **Question by the defense counsel:**

8 Q [MR. SCHNEIDER]: Good afternoon, Special Agent [REDACTED].

9 A [MR. [REDACTED]]: Good afternoon.

10 Q [MR. SCHNEIDER]: Let me ask you a question about the last
11 exhibit.

12 A [MR. [REDACTED]]: 259?

13 Q [MR. SCHNEIDER]: What, in your view, is the significance of
14 the exhibit with regard to the circumstances in which Mr. Hamdan was
15 treated while in custody? Is there any?

16 A [MR. [REDACTED]]: Are you asking me what's the significance of
17 the map to how he's treated in custody?

18 Q [MR. SCHNEIDER]: Right. The circumstances of his
19 confinement, or whether he was coerced or mistreated.

20 I'll withdraw the question.

21 A [MR. [REDACTED]]: I don't know that I could comment on the
22 significance.

23

1 Q [MR. SCHNEIDER]: Well, as long as it's up, let me ask you
2 this. Can you tell us where in Afghanistan Mr. Hamdan was and how he
3 was treated and by whom during the period November 28th through
4 December 28th, 2001?

5 A [MR. [REDACTED]]: I cannot.

6 Q [MR. SCHNEIDER]: Let me ask you with specific reference to
7 another time period, early summer, 2003. What light can you shed on
8 the circumstances of his interrogations and how he was treated during
9 that time frame based on your own personal experience?

10 A [MR. [REDACTED]]: None.

11 Q [MR. SCHNEIDER]: New topic. Does Special Agent [REDACTED]
12 speak Arabic fluently?

13 A [MR. [REDACTED]]: Yes, he does.

14 Q [MR. SCHNEIDER]: So if he heard Mr. Hamdan say that he
15 observed beatings at Bagram and failed to translate that for you,
16 that doesn't mean he didn't hear it directly from Mr. Hamdan. Does
17 it?

18 A [MR. [REDACTED]]: It does not.

19 Q [MR. SCHNEIDER]: Is it possible that that's what happened?

20 CTC [MR. MURPHY]: Objection. That calls for speculation.

21 MJ [CAPT ALLRED]: I know the answer to that question. It's
22 possible that that happened, I suppose. Would you like the witness
23 to answer the question?

1 CDC [MR. SCHNEIDER]: I'm not going to fool with the court's
2 answer.

3 Q [MR. SCHNEIDER]: New subject. Are there typically procedures
4 and policies that govern your interrogations? Standard procedures.

5 A [MR. ██████████]: We would call them interviews rather than
6 interrogations. But, yes.

7 Q [MR. SCHNEIDER]: For instance, if someone is a suspect in an
8 ongoing criminal investigation, is it standard procedure, typically,
9 to advise that person of his or her rights?

10 A [MR. ██████████]: If they're both a suspect and in custody, and
11 the questions that we're going to pose to that individual are
12 expected to or could be reasonably expected to elicit incriminating
13 responses, then, yes, it would be standard procedure to read what we
14 would call a Miranda warning.

15 Q [MR. SCHNEIDER]: But the FBI standard procedures were not in
16 effect, as you understand it, when you conducted your interview in
17 2002. Correct?

18 A [MR. ██████████]: That is correct.

19 Q [MR. SCHNEIDER]: And if you had conducted the interview of
20 Mr. Hamdan elsewhere and whatever policy applied at Guantanamo was
21 not in place, would you have given him his rights? You, personally?

22 A [MR. ██████████]: If it would have been outside of the United
23 States in Afghanistan, let's say, perhaps not. If it was in the

1 United States, I would have.

2 Q [MR. SCHNEIDER]: Well, let's talk about not taking him, I
3 don't know, 6,000 or 8,000 miles away, but a few hundred miles away,
4 Florida, you would have given him his rights?

5 A [MR. [REDACTED]]: Yes. If he was in Florida, I would have.

6 Q [MR. SCHNEIDER]: The same circumstances, the same suspect,
7 the same crime, the same time; June of 2002, 100 miles away. You
8 would have given him his rights?

9 A [MR. [REDACTED]]: Yes, I would have.

10 Q [MR. SCHNEIDER]: And that is because you understood he was a
11 suspect in an investigation of a crime at the time. Correct?

12 A [MR. [REDACTED]]: Yes.

13 Q [MR. SCHNEIDER]: In various 302s, there's information
14 regarding what he allegedly said in his interviews. And looking at
15 one of them, there's reference to weapons training, driving bin
16 Laden, participating in an evacuation of bin Laden's camps in
17 mid-September 2001. Are those the types of things that would tend to
18 cause you to think he was a suspect in crimes related to 9/11?

19 A [MR. [REDACTED]]: Among other things.

20 [END OF PAGE]

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23

1 Q [MR. SCHNEIDER]: Among other things. The 302 I was looking
2 at is from January of 2002, an interview you did not conduct. So if
3 you had heard those things in January as opposed to May--or June,
4 rather, you would have had the same understanding?

5 A [MR. ██████]: Yes.

6 Q [MR. SCHNEIDER]: Do you have any knowledge of the use of a
7 BSCT team during interrogations in Guantanamo?

8 A [MR. ██████]: I'm sorry?

9 Q [MR. SCHNEIDER]: I'm just telling you what I heard.
10 Behavioral Science Consultation Team. Military psychiatrists
11 advising interrogators how to maximize interrogation results.

12 A [MR. ██████]: I don't believe so.

13 Q [MR. SCHNEIDER]: Any knowledge of sleep deprivation
14 techniques being used to enhance the results of interrogation during
15 your personal experience with regard to Mr. Hamdan?

16 A [MR. ██████]: No.

17 Q [MR. SCHNEIDER]: Have you ever heard of that?

18 A [MR. ██████]: I have heard of that obviously through the news
19 reports about what's going on. I don't think anyone who is following
20 the news can't be exposed to that. But not based on any personal
21 knowledge that I have, but just the allegations that have been made
22 in the news.

23

1 Q [MR. SCHNEIDER]: That's not FBI procedure. Is it?

2 A [MR. ██████]: Absolutely not.

3 Q [MR. SCHNEIDER]: And it's not something you would condone or
4 utilize. Correct?

5 A [MR. ██████]: I would not utilize it. It's not something
6 that I would ask to be done. So, I would have to say no.

7 Q [MR. SCHNEIDER]: And you never have?

8 A [MR. ██████]: Never.

9 Q [MR. SCHNEIDER]: Have you ever heard of Operation Sandman
10 before a couple days ago?

11 A [MR. ██████]: This is the first time I've heard of Operation
12 Sandman.

13 Q [MR. SCHNEIDER]: As we talk?

14 A [MR. ██████]: As we talk.

15 Q [MR. SCHNEIDER]: With regard to the events at the time Mr.
16 Hamdan was apprehended, isn't it fair to say you can't shed any light
17 on who interviewed him, how they treated him, how he was treated,
18 whether he was mistreated, during the seven days after he was
19 apprehended. Correct?

20 A [MR. ██████]: No, I probably couldn't shed any light on that.

21 [END OF PAGE]

22

23

1 Q [MR. SCHNEIDER]: And with regard to what happened to him
2 immediately thereafter when he left Takteh-Pol and before he was
3 returned to Bagram Air Base, you can't shed any light on that?

4 A [MR. ██████]: No.

5 Q [MR. SCHNEIDER]: Do you know who can?

6 A [MR. ██████]: I would imagine those that captured him,
7 perhaps the guards at Bagram, and those that interviewed him at
8 Bagram would probably be the best source of that.

9 Q [MR. SCHNEIDER]: What about Mr. Hamdan? Would he be in a
10 position, do you think?

11 A [MR. ██████]: He would be in an excellent position to do
12 that.

13 Q [MR. SCHNEIDER]: And are you aware of all those books Mr.
14 Hamdan and those that took care of him who were there at that time,
15 how many of them are testifying in the next day or so?

16 A [MR. ██████]: I suppose you would be able to tell me if Mr.
17 Hamdan is. But as for the rest, I don't know.

18 Q [MR. SCHNEIDER]: With regard to withholding medical care,
19 have you ever heard anything about an event on August 28, 2002, after
20 your interview was complete, whether that occurred, where an
21 interrogator, perhaps even an FBI agent, suggested that medical
22 attention be withheld?

23 A [MR. ██████]: I've not heard of that.

1 Q [MR. SCHNEIDER]: Was there a woman interrogator participating
2 in any of the interviews you conducted over that, what was it, a
3 two-week period?

4 A [MR. [REDACTED]]: A little over two weeks. No, there was not.

5 Q [MR. SCHNEIDER]: So are you in a position to shed any light
6 on what happened during an interrogation when a female interrogator
7 participated?

8 A [MR. [REDACTED]]: I couldn't help you with that.

9 Q [MR. SCHNEIDER]: Do you know whether anybody--do you know
10 whether any organization, any individual ever interrogated or
11 interviewed Mr. Hamdan while in custody without generating a written
12 report?

13 A [MR. [REDACTED]]: I don't know if that occurred.

14 Q [MR. SCHNEIDER]: Based on your knowledge, experience, and
15 training and what you've learned about Mr. Hamdan, and the
16 investigation in which you participated, would it surprise you to
17 know that there are no written reports of any interrogations until
18 January of 2002 when your colleague, Mr. [REDACTED], prepared a 302?

19 A [MR. [REDACTED]]: It would not be surprising in the sense that
20 I've had a similar experience in Afghanistan when I was in the first
21 group of agents to go to Afghanistan, and some of the reports for
22 whatever reason that we generated did not make it back to the file.

23

1 Q [MR. SCHNEIDER]: Okay. Generally speaking--and set aside
2 Afghanistan for a moment, generally speaking, as a matter of
3 investigation, does it make sense, generally, to try to get the
4 information sooner rather than later?

5 A [MR. [REDACTED]]: Yes, it does.

6 Q [MR. SCHNEIDER]: To interrogate a suspect, or even someone
7 with just intelligence capabilities, soon after apprehension rather
8 than waiting three months?

9 A [MR. [REDACTED]]: If it's of an intelligence nature, sooner would
10 be better.

11 Q [MR. SCHNEIDER]: With respect to the circumstances of Mr.
12 Hamdan's confinement at the time you were talking to him, being June
13 26th and July 9th, 2002, I think you told me--actually, you told a
14 lot of people, not just me, sometime around July 8th, it came to your
15 attention that he was in solitary confinement?

16 A [MR. [REDACTED]]: That's how Mr. Hamdan had put it.

17 Q [MR. SCHNEIDER]: And is it fair to say that that bothered
18 you?

19 A [MR. [REDACTED]]: It's very fair to say that.

20 Q [MR. SCHNEIDER]: Would it be fair to say that you sort of
21 flipped out, in the words of one of your colleagues, when you heard
22 that?

23 A [MR. [REDACTED]]: I don't know that I would characterize it as

1 flipping out. But I was very upset.

2 Q [MR. SCHNEIDER]: And was part of the reason you were upset,
3 because Mr. Hamdan attributed that to the FBI and you believed that
4 wasn't the case?

5 A [MR. [REDACTED]]: It was partly for that. And it was, I would
6 say, additionally because I did not see any reason whatsoever for
7 that type of treatment.

8 Q [MR. SCHNEIDER]: Were you aware that his so-called "comfort
9 items" had been removed? He didn't tell you that?

10 A [MR. [REDACTED]]: I do not believe so.

11 Q [MR. SCHNEIDER]: Did you take steps--I won't use the word
12 flipping out. But did you take steps which you thought were
13 appropriate, based on what you knew and had heard, to try to remedy
14 that situation?

15 A [MR. [REDACTED]]: Yes, I did.

16 Q [MR. SCHNEIDER]: What did you do?

17 A [MR. [REDACTED]]: I can't tell you who I talked to because I
18 don't recall who it was. But I did go to the military, who I thought
19 was--whoever was in charge at the time of that, expressed my
20 displeasure with what had happened, and asked that it be immediately
21 remedied and as well as why this was happening.

22 Q [MR. SCHNEIDER]: Did you understand that it was remedied?

23 A [MR. [REDACTED]]: Yes.

1 Q [MR. SCHNEIDER]: As a result of your intervention?

2 A [MR. ██████]: I don't know if it was a result of my
3 intervention, but I think it changed.

4 Q [MR. SCHNEIDER]: I suppose it could have been a coincidence.
5 But it changed right after you intervened. Didn't it?

6 A [MR. ██████]: I think that's right.

7 Q [MR. SCHNEIDER]: And for the record, I'm looking at the
8 Declaration of Lieutenant Commander Mizer filed July 13. And one of
9 the records indicates, I'm going to read it to you just to see if it
10 makes any sense to you. That on July 8th, 2002, detainee, there's a
11 number, Mr. Hamdan's number, is to be moved to M-19. That's July
12 8th, 2002. Was that about the time you intervened?

13 A [MR. ██████]: Yes.

14 Q [MR. SCHNEIDER]: The very day?

15 A [MR. ██████]: Yes.

16 Q [MR. SCHNEIDER]: Do you know that M-19 is not a maximum
17 security facility, but is a place where you can reside not in
18 solitary confinement?

19 A [MR. ██████]: No.

20 Q [MR. SCHNEIDER]: You don't know? Were you aware that the
21 very next--no, the same day, July 8th, 2002, his comfort items were
22 returned?

23 A [MR. ██████]: I didn't know that, either.

1 Q [MR. SCHNEIDER]: Based on what you know about that event, if
2 in fact those two things occurred, he was returned to a different
3 facility and his comfort items were put back in his possession, do
4 you think it would be reasonable for Mr. Hamdan to conclude that the
5 FBI had had some input into how he would be incarcerated for the
6 balance of your interrogation?

7 A [MR. ████████]: It's a tough question to answer, because I
8 think when he got put into solitary he was very upset with us almost
9 to the point that he blamed us for that. And so I don't know. Yeah,
10 I guess he could say that we would have something to do with it on
11 both ends. He could I guess reasonably see that.

12 Q [MR. SCHNEIDER]: And, in fact, didn't it take you some time
13 during your conversations with him to calm him down and disabuse him
14 of the notion that you had put him into solitary? True?

15 A [MR. ████████]: Yes, it did.

16 CDC [MR. SCHNEIDER]: Thank you.

17 **REDIRECT EXAMINATION**

18 **Question by the trial counsel:**

19 Q [MR. MURPHY]: Agent ████████, after that incident, did you
20 obtain any admissions of value from Mr. Hamdan?

21 A [MR. ████████]: I think we had two--if you include the 8th, we
22 had another session with Mr. Hamdan and then the 9th where we did
23 obtain a few more admissions from Mr. Hamdan.

1 Q [MR. MURPHY]: Can you describe the tone of those sessions
2 with Mr. Hamdan?

3 A [MR. [REDACTED]]: July 8th after we came back was a little tense.
4 I think Mr. Hamdan and I had a pretty good rapport going to that
5 point. I think he felt like I might have let him down a bit. So it
6 took a little bit to get him to understand that I had nothing to do
7 with that, and so it took another day or so to get that back.
8 And--to get it back to a conversational style. And I don't know that
9 we ever got back to where it was.

10 Q [MR. MURPHY]: Did you indicate in some way that you weren't
11 responsible for these changed circumstances to him?

12 A [MR. [REDACTED]]: Absolutely.

13 Q [MR. MURPHY]: And did he seem to accept this from you?

14 A [MR. [REDACTED]]: That's a tough one. You know, I don't know.
15 That would be something that he would have to answer. But I would
16 say I don't think it was the same.

17 Q [MR. MURPHY]: Did you have to do anything differently with
18 him to reengage at that point?

19 A [MR. [REDACTED]]: Yeah, we did. We had to try to regain his
20 trust. And whether or not we were successful, I don't know. I don't
21 know.

22

23

1 Q [MR. MURPHY]: Did he nevertheless indicate a willingness to
2 continue to talk to you?

3 A [MR. ██████]: He did. He did talk a little bit further with
4 us for the 8th and then the 9th.

5 CTC [MR. MURPHY]: If I could just have a moment.

6 Q [MR. MURPHY]: And would it be fair to say that rather
7 benefiting your effort, this change of condition actually hurt the
8 underlying effort to have him cooperate with you in the interview?

9 A [MR. ██████]: Absolutely. Absolutely. It really hurt what I
10 thought was going on and what we were trying to accomplish.

11 Q [MR. MURPHY]: Are you satisfied that the information he gave
12 to you after that event was something he willingly gave you, as
13 opposed to being forced or felt threatened or concerned?

14 A [MR. ██████]: Yes. He gave it willingly.

15 CTC [MR. MURPHY]: Nothing further, Your Honor.

16 MJ [CAPT ALLRED]: Very good. Thank you.

17 CDC [MR. SCHNEIDER]: Agent ██████, I have no more questions.

18 CTC [MR. MURPHY]: Your Honor, next witness.

19 MJ [CAPT ALLRED]: Wait.

20 CTC [MR. MURPHY]: I'm sorry. I apologize, Your Honor. I
21 didn't realize you had questions.

22

23

1 **EXAMINATION BY THE MILITARY COMMISSION**

2 **Question by the military judge:**

3 Q [CAPT ALLRED]: I just wanted to make sure I understood you
4 correctly. I don't know whose question it was. I got the impression
5 earlier that someone made it very clear to you that you had nothing
6 to say about the conditions of any detainee's confinement; and yet,
7 it appears that your protest was effective immediately in changing
8 it. Is that the same visit we're talking about?

9 A [MR. ██████]: Let me see if I understand. That I had nothing
10 to do with the conditions.

11 Q [CAPT ALLRED]: Do you remember saying that? I wrote in my
12 notes, "We were told clearly that we could interview, but could not
13 dictate any of the terms of his confinement."

14 A [MR. ██████]: That was not when I flipped out, but when I had
15 the conversations with the military about Mr. Hamdan.

16 Q [CAPT ALLRED]: So they told you to pack sand, and then they
17 immediately changed the conditions of his confinement. Is that what
18 happened? To butt out.

19 A [MR. ██████]: Yes, sir.

20 Q [CAPT ALLRED]: That was the same visit, the same protest?
21 And even as they said no, they meant yes? Or soon thereafter.

22 A [MR. ██████]: That would be correct.

23

1 Q [CAPT ALLRED]: You're in the interrogation with Mr. Hamdan.
2 A [MR. ██████]: Yes, sir.
3 Q [CAPT ALLRED]: You leave the interrogation room to protest.
4 You come back to the interrogation room with news that he has been
5 taken out of solitary confinement?
6 A [MR. ██████]: No, sir. I didn't know that he had been taken
7 out of the solitary confinement, but went back to him just to tell
8 him again that I had gone to the military to protest this, and I had
9 absolutely nothing to do with this. And I don't recall whether or
10 not he had told me that he had been moved or not, but that he
11 said--it was along the lines of, "I understand. Let's move on."
12 Q [CAPT ALLRED]: Did he know by that time that he had been
13 moved out of solitary? Or did he learn that night when he went back
14 to his room or to his cell?
15 A [MR. ██████]: I don't know that off the top of my head.
16 MJ [CAPT ALLRED]: Okay. That was my only question. Any final?
17 CTC [MR. MURPHY]: Nothing further, Your Honor.
18 MJ [CAPT ALLRED]: Thank you, Special Agent ██████. You may
19 return to the waiting area.
20 CTC [MR. MURPHY]: Your Honor, the government would call Special
21 Agent ██████, who is waiting in the deliberation room.
22 MJ [CAPT ALLRED]: Thank you.
23 CTC [MR. MURPHY]: And I would ask Agent ██████ if he could send

1 him in.

2 **[The witness was excused and withdrew from the courtroom.]**

3 **[The next witness entered the courtroom.]**

4 CTC [MR. MURPHY]: Special Agent [REDACTED], if you could approach
5 the witness area, face me, and raise your right hand. I will swear
6 you in.

7 [REDACTED], Civilian, was called as a witness for the
8 prosecution, was sworn and testified as follows:

9 CTC [MR. MURPHY]: Please be seated.

10 **[The witness did as directed.]**

11 **DIRECT EXAMINATION**

12 **Question by the trial counsel:**

13 Q [MR. MURPHY]: Could you state your full name and spell your
14 last name for the record.

15 A [MR. [REDACTED]]: [REDACTED]

16 Q [MR. MURPHY]: And who are you employed by, and what are your
17 duties?

18 A [MR. [REDACTED]]: I'm employed by the Federal Bureau of
19 Investigation. I'm a special agent.

20 Q [MR. MURPHY]: All right. And in the interest of moving
21 through this quickly, I'm going to skip over your background.

22 A [MR. [REDACTED]]: Okay.

23

1 Q [MR. MURPHY]: And just ask you directly, did you receive an
2 assignment to interview the accused in this case, Salim Hamdan?

3 A [MR. [REDACTED]]: Yes.

4 Q [MR. MURPHY]: When did you get this assignment?

5 A [MR. [REDACTED]]: Upon my arrival to Guantanamo Bay, Cuba,
6 August of 2002. Or, actually, excuse me. July 2002.

7 Q [MR. MURPHY]: And did you in fact interview Mr. Hamdan, with
8 others?

9 A [MR. [REDACTED]]: Yes.

10 Q [MR. MURPHY]: I would ask you to look around the courtroom,
11 and see if you recognize Mr. Hamdan today.

12 A [MR. [REDACTED]]: I do.

13 Q [MR. MURPHY]: If you could, please point to him and identify
14 an article of clothing he is wearing.

15 A [MR. [REDACTED]]: It's the gentleman wearing the white
16 headscarf.

17 CTC [MR. MURPHY]: May the record reflect that the witness has
18 properly identified the accused in this case?

19 MJ [CAPT ALLRED]: Very well.

20 Q [MR. MURPHY]: You gave us the date of your arrival in
21 Guantanamo. Can you give us the time period during which you
22 interviewed the accused?

23 A [MR. [REDACTED]]: Yes. I interviewed Mr. Hamdan twice, with a

1 third attempt in August 2002.

2 Q [MR. MURPHY]: And the first being?

3 A [MR. [REDACTED]]: I think we attempted August 19th was our first
4 attempt that--actually, our first interview of Mr. Hamdan.

5 Q [MR. MURPHY]: Okay. Where did you interview him?

6 A [MR. [REDACTED]]: We interviewed him in a interview room at Camp
7 Delta at the time.

8 Q [MR. MURPHY]: For a total of three times?

9 A [MR. [REDACTED]]: Three times. Yes.

10 Q [MR. MURPHY]: Could you describe the room or rooms that these
11 took place in?

12 A [MR. [REDACTED]]: Yes. The interview rooms were small interview
13 rooms that I think were part of like kind of a mobile home or one of
14 those modular homes, and they were cordoned off into rooms. The
15 rooms just had a table and chairs, a two-way mirror, and air
16 conditioning.

17 Q [MR. MURPHY]: And were there other people with you during
18 these interview sessions?

19 A [MR. [REDACTED]]: Yes.

20 Q [MR. MURPHY]: Who were they?

21 A [MR. [REDACTED]]: I had a task force officer from the New York
22 office and a linguist.

23

1 Q [MR. MURPHY]: The interviews took place in Arabic?

2 A [MR. ██████████]: Well, I obviously don't speak Arabic. So we
3 would ask the questions to the linguist, and he in turn would
4 translate to Arabic.

5 Q [MR. MURPHY]: All right. Using this process, were you able
6 to understand everything that Mr. Hamdan said during the interviews?

7 A [MR. ██████████]: Yes. Through the translator.

8 Q [MR. MURPHY]: Could you describe the seating arrangements,
9 and also how close you and the other agents and people were
10 physically to Mr. Hamdan?

11 A [MR. ██████████]: There was a table that separated us. Mr.
12 Hamdan was to the one side, we were on the other. He would sit on a
13 metal chair; I believe we had cushioned chairs. And we were
14 approximately three feet from Mr. Hamdan.

15 Q [MR. MURPHY]: How would you describe the tone of your
16 interview with Mr. Hamdan?

17 A [MR. ██████████]: The tone? Cordial.

18 Q [MR. MURPHY]: I'm going to ask you to define the phrase
19 "open-ended questions" the way you would choose to define that, and
20 then ask you if that was the type of question you asked Mr. Hamdan?

21 A [MR. ██████████]: Okay. An open-ended question from my point of
22 view is asking a question that has several possible responses. It's
23 to initiate a conversation. So I may ask someone, tell me where you

1 were at this point in time. Or, how did you get from point A to
2 point B? And it was more to elicit responses from the subject.

3 Q [MR. MURPHY]: And were those the types of questions you asked
4 Mr. Hamdan?

5 A [MR. [REDACTED]]: Yes.

6 Q [MR. MURPHY]: Did you or anyone you were with ever yell at
7 Mr. Hamdan or act in any manner that you would consider threatening?

8 A [MR. [REDACTED]]: No.

9 Q [MR. MURPHY]: At any time during his interviews, did the
10 accused ever tell you he was abused, mistreated, or tortured by
11 anyone at any time?

12 A [MR. [REDACTED]]: Never.

13 Q [MR. MURPHY]: What would you have done if you received such a
14 report?

15 A [MR. [REDACTED]]: I would probably--well; I would indicate that
16 in my report. And then that report is then passed on to supervisors.
17 What they do with that information, I'm not sure of. But I would
18 document it in my report.

19 Q [MR. MURPHY]: And it was not necessary to do that? It was
20 not necessary to make any such report?

21 A [MR. [REDACTED]]: No. There was no claim made.

22

23

1 Q [MR. MURPHY]: Did you have an opportunity to view the
2 accused's detention facility and the guards working at the detention
3 facility?

4 A [MR. ██████████]: I had limited ability to view what was the
5 guards and the prison.

6 Q [MR. MURPHY]: And based on that limited view, what did you
7 see?

8 A [MR. ██████████]: I would--and once we got through the gates of
9 Delta, we would walk to the interview house or rooms. Sometimes you
10 would see detainees being transported by like a modified golf cart
11 and the guards would be driving the cart. One would be maybe sitting
12 next to--I guess--I can't remember if I saw Mr. Hamdan in this
13 scenario, but the detainee would be sitting next to a guard. They
14 would be handcuffed, and then led into the interview room.

15 Q [MR. MURPHY]: Did you ever observe or hear any reports about
16 guards abusing this accused or any other detainee at the facility?

17 A [MR. ██████████]: No.

18 Q [MR. MURPHY]: Did Mr. Hamdan tell you that he was ever forced
19 to speak against his will to anyone, or make up information for any
20 reason?

21 A [MR. ██████████]: No.

22

23

1 Q [MR. MURPHY]: Did you provide the accused opportunities to
2 eat and drink?

3 A [MR. [REDACTED]]: Yes. There was a bathroom in the interviewing
4 area. So we would take regular breaks because, one, Mr. Hamdan or an
5 interviewee would request it. And it was taxing on the linguist, so
6 we would have to take periodic breaks.

7 Q [MR. MURPHY]: Did Mr. Hamdan indicate a willingness to talk
8 to you?

9 A [MR. [REDACTED]]: Yes.

10 Q [MR. MURPHY]: And how did he indicate that to you?

11 A [MR. [REDACTED]]: Simply by answering questions I asked of him.

12 Q [MR. MURPHY]: Did you provide him any rights warnings, such
13 as Article 31 rights under the UCMJ, or Miranda type warnings?

14 A [MR. [REDACTED]]: No.

15 Q [MR. MURPHY]: Why was that?

16 A [MR. [REDACTED]]: We had an in-brief while I was with some other
17 people when I arrived here at the base, and we were kind of given a
18 briefing. And part of that briefing was not to Mirandize while
19 interviewing these individuals.

20 Q [MR. MURPHY]: Was it clear to you that Mr. Hamdan was free to
21 speak with you, and also free not to speak with you?

22 A [MR. [REDACTED]]: Yes.

23

1 Q [MR. MURPHY]: How was that made clear?

2 A [MR. [REDACTED]]: I think the most obvious example would be our
3 third attempt to interview Mr. Hamdan, because we had some
4 inconsistencies, which I guess--which are normal when you interview
5 someone over several periods. So we wanted to clarify those
6 inconsistencies and ask some additional questions. On our third
7 time, Mr. Hamdan said, "I don't feel like speaking to you." We
8 notated it in a report and terminated the interview.

9 Q [MR. MURPHY]: All right. How long did the interview sessions
10 last?

11 A [MR. [REDACTED]]: Well, the two that we did get information from
12 Mr. Hamdan, I'm not exactly sure; but we interviewed several people
13 that day. So I would say two hours. Two, two and a half hours. But
14 that includes the breaks because, like I said, we would break often
15 so that the linguist could catch his breath.

16 Q [MR. MURPHY]: Was it important to you as an investigating
17 agent that the information that you were provided was both reliable
18 and accurate?

19 A [MR. [REDACTED]]: Absolutely.

20 Q [MR. MURPHY]: Why was that important to you?

21 A [MR. [REDACTED]]: That information was going to be potentially
22 used for lead value. And I'm not going to disseminate that
23 information if I don't believe it to be true and accurate.

1 Q [MR. MURPHY]: Did you write up FBI 302s, form 302s as a
2 result of your interviews?

3 A [MR. [REDACTED]]: Well, my partner wrote--actually typed 302s in
4 Mr. Hamdan's case. I reviewed them and also signed off on them.

5 Q [MR. MURPHY]: And those are intended to be summaries of what
6 you learned during the interviews.

7 A [MR. [REDACTED]]: Yes.

8 Q [MR. MURPHY]: Is that right?

9 A [MR. [REDACTED]]: Yes.

10 Q [MR. MURPHY]: All right. I'm going to ask you some questions
11 that came up during the course of this hearing. I'm going to go
12 through all of them, and then ask you if you have heard or have any
13 knowledge about any of these allegations. And they include the
14 following:

15 That personal property was taken away from Mr. Hamdan to
16 help facilitate the interviews. That medical care was either
17 provided or not provided to Mr. Hamdan based on how well he was doing
18 in the interviews. That interrogators inappropriately touched him,
19 including an allegation of a female interrogator, in the groin area.
20 That he was placed into solitary confinement at the direction of
21 interrogators that helped the interrogation process. That he was
22 abused at Bagram by a soldier putting his knee in Mr. Hamdan's back.
23 And in Kandahar, he was threatened to be killed, the allegation being

1 directed at FBI Agents [REDACTED] and [REDACTED]. And a gun was placed in
2 front of Mr. Hamdan in Kandahar and threatening.

3 Do you know anything about those allegations?

4 A [MR. [REDACTED]]: I never heard anything like that.

5 Q [MR. MURPHY]: All right. Some other allegations.

6 That he saw local Afghani forces shoot and kill an Arab; and
7 because of that, he felt U.S. forces or special agents were a threat
8 to him. That he reported that he made up false information to agents
9 about transporting weapons. That someone put a hood over his head;
10 and because of that, he believed he would be killed. That he saw
11 detainees beaten to death in Bagram and, as a result, he believed
12 that his survival depended on cooperating with U.S. officials. He
13 saw detainees beaten and lying on a tarmac, somewhere, in extreme
14 cold weather, and that this caused him to be at the mercy of U.S.
15 agents.

16 These allegations, do you have any information from any
17 source about those?

18 A [MR. [REDACTED]]: I've never heard that. I do want to repeat
19 the first question, because I believe Mr. Hamdan said in interviews
20 that he witnessed someone killed upon his capture. Is that what
21 you're referring to?

1 Q [MR. MURPHY]: Yes. At the point of his capture. But also,
2 the question is saying, because of that, he felt threatened by U.S.
3 forces and special agents.

4 A [MR. [REDACTED]]: No. I've never heard that. No.

5 Q [MR. MURPHY]: All right. Could you summarize for us before
6 we turn to some exhibits, just summarize for us briefly the key
7 admissions that Mr. Hamdan provided to you during your interviews
8 with him.

9 A [MR. [REDACTED]]: Sure. Mr. Hamdan stated that he originally
10 entered Afghanistan to make his way into another country to engage
11 Russians. He was unable to do that. And, in process, through a
12 series of acquaintances or friends, met bin Laden, became his driver,
13 became part of his body guard detail; helped move Osama bin Laden
14 from different camps, Kandahar, Tarnak Farms. And then we move into
15 his ultimate capture when he post 9/11 was separated from his wife
16 and was captured on his way.

17 Q [MR. MURPHY]: Can you tell us a little bit what was said
18 about his capture?

19 A [MR. [REDACTED]]: He said he was in a--he was with two other
20 cars, three total, when he was stopped by Afghanis. The individuals
21 in the first car got into an altercation with that individual. He
22 was killed. Mr. Hamdan then ducked down in his car and was
23 subsequently captured. And then, he had a weapon in the vehicle when

1 he was captured, and then from there he was eventually put into U.S.
2 custody.

3 Q [MR. MURPHY]: All right.

4 CTC [MR. MURPHY]: Your Honor, we are going to move into just a
5 few classified documents at this point. And I would request from the
6 Commission that we use the same procedure that we used earlier, with
7 your permission.

8 MJ [CAPT ALLRED]: Sure. Do you have copies for the defense?

9 CTC [MR. MURPHY]: We have hard copies for the defense. As I
10 indicated earlier on the record, this has been coordinated with Mr.
11 Powell, our security officer, who agrees that this procedure is
12 appropriate.

13 MJ [CAPT ALLRED]: Very good.

14 CTC [MR. MURPHY]: And may the record reflect that I'm handing a
15 hard copy of these SECRET documents to the defense counsel.

16 MJ [CAPT ALLRED]: Very good.

17 CTC [MR. MURPHY]: And in keeping with our practice, there's a
18 total of eight--I'm sorry, nine photographs that I would like
19 displayed first only to the military judge. I would request that all
20 of them be marked in toto as the next appellate exhibit in order,
21 which I believe is 269. I don't think they need individual
22 identification.

23 MJ [CAPT ALLRED]: Very good.

1 CTC [MR. MURPHY]: I would make that request, and ask the
2 technology be set up so that we show these only to the military
3 judge.

4 MJ [CAPT ALLRED]: It seems like the last time we solved the
5 problem in the gallery by turning off the monitors at counsel table.

6 CDC [MR. SWIFT]: We turned them off.

7 MJ [CAPT ALLRED]: Very good.

8 Okay. I see what looks like number one.

9 WIT [MR. ██████████]: I don't have anything on my screen.

10 MJ [CAPT ALLRED]: Good. Okay, I don't need to see all nine of
11 these. Let's go to something we can show the witness now.

12 **[APPELLATE EXHIBIT 269.]**

13 CTC [MR. MURPHY]: All right. With the permission of the Court,
14 I would now like to show each of these in series to our witness. The
15 hard copies as they were, are in the series they will be presented to
16 the witness.

17 All right. Let's turn to the first photograph and show it
18 to our witness.

19 Q [MR. MURPHY]: Special Agent ██████████, do you see that?

20 A [MR. ██████████]: Yes.

21 Q [MR. MURPHY]: Can you identify that photograph?

22 A [MR. ██████████]: This is a picture I showed to Mr. Hamdan
23 during an interview.

1 Q [MR. MURPHY]: And can you tell us what it reflects, what
2 image you're seeing, and what Mr. Hamdan said about it, if anything?

3 A [MR. ██████████]: This is a picture of the detainee which I
4 showed to Mr. Hamdan, who then told me that this individual is of
5 Yemeni origin, was a bodyguard for Osama bin Laden, and was last seen
6 in Osama bin Laden's company ten days before Ramadan. And he knew
7 him by the name Daoud.

8 Q [MR. MURPHY]: All right. Let's turn to the second photograph
9 in Appellate Exhibit 269.

10 A [MR. ██████████]: Again, this is a detainee photo--photos that I
11 showed Mr. Hamdan. He proceeded to tell me again this is a Yemeni
12 national who was a body guard for Osama bin Laden and was with Osama
13 bin Laden after 9/11 and has the name Anas.

14 Q [MR. MURPHY]: Let's turn now to the third photograph. What,
15 if anything, did Mr. Hamdan say about that photograph?

16 A [MR. ██████████]: Again, a Yemeni national who was a body guard
17 for Osama bin Laden. He went into a little more detail on this
18 individual and said that he saw this individual named Salman wearing
19 Afghanistan style clothing, his face was covered, and was seen
20 carrying an AK-47 rifle.

21 Q [MR. MURPHY]: Let's turn now to the fourth photograph.

22 A [MR. ██████████]: This is a picture shown to Mr. Hamdan. He had
23 little information on this individual, and said he may have seen him

1 at a guesthouse either at Kandahar or Kabul.

2 Q [MR. MURPHY]: Let's turn now to the fifth photograph.

3 A [MR. [REDACTED]]: Again, this is a Yemeni national by the name
4 Saqr. And Mr. Hamdan stated he was a bodyguard for Osama bin Laden
5 after 9/11.

6 Q [MR. MURPHY]: Let's turn to photograph six.

7 A [MR. [REDACTED]]: Again, another detainee photo I showed Mr.
8 Hamdan. He only provided me this individual's name, the name Gamin.

9 Q [MR. MURPHY]: That's all he said?

10 A [MR. [REDACTED]]: That's all he provided at that time. I
11 intended to go back and ask him more about these individuals, but
12 wasn't able to do so.

13 Q [MR. MURPHY]: Okay. Let's turn to photograph seven.

14 A [MR. [REDACTED]]: Yeah. Again, I showed this series of photos
15 to Mr. Hamdan. He stated this is actually a Sudanese individual who
16 was a bodyguard for Osama bin Laden before 9/11, and was also the
17 cook for the bodyguards.

18 Q [MR. MURPHY]: Let's turn to photograph eight.

19 A [MR. [REDACTED]]: Yes. I showed this picture to Mr. Hamdan. He
20 stated he had seen this individual in bin Laden's safehouse. And,
21 again, he went into a little more detail with this individual. He
22 had seen him wearing Afghanistan style clothing. His face was
23 covered. He had an AK-47 rifle, and said that this person was

1 regular bodyguard for Osama bin Laden.

2 Q [MR. MURPHY]: Okay. And let's turn to the last photograph,
3 photograph nine.

4 A [MR. [REDACTED]]: I showed this picture to Mr. Hamdan, and he
5 had no information on this individual.

6 Q [MR. MURPHY]: Did these photographs assist you in
7 corroborating the admissions made to you by Mr. Hamdan?

8 A [MR. [REDACTED]]: Well, I wouldn't say they corroborated. What
9 it did, because it put him in the company of these individuals. So,
10 yeah, I guess I would say it corroborated his story that he was the
11 driver and part of bin Laden's inner circle. So, yes, I would say
12 that that corroborated his story.

13 CTC [MR. MURPHY]: Okay. I have no further questions, and would
14 tender the witness.

15 MJ [CAPT ALLRED]: Very good. Thank you.

16 CTC [MR. MURPHY]: And, Your Honor, we would close out the
17 classified material on the screens at this point.

18 MJ [CAPT ALLRED]: And why don't you retrieve your SECRET
19 document from the defense.

20 CTC [MR. MURPHY]: If the defense is done with them. I don't
21 know if they need it on cross or not. I see they are handing it back
22 to me. So may the record reflect that I've received all the
23 classified material back, and I'm handing it to Technical Sergeant

1 Gibbs.

2 MJ [CAPT ALLRED]: Very good. Thank you.

3 CDC [MR. SWIFT]: I'm wondering if I could have the envelope,
4 please.

5 **CROSS-EXAMINATION**

6 **Question by the defense counsel:**

7 Q [MR. SWIFT]: Good afternoon. My name is Charlie Swift. I'm
8 Mr. Hamdan's counsel. How are you?

9 A [MR. [REDACTED]]: Good. How are you today?

10 Q [MR. SWIFT]: Good. Now, you conducted these interrogations
11 in August--or interviews in August of 2002. Is that correct?

12 A [MR. [REDACTED]]: Yes.

13 Q [MR. SWIFT]: And you interviewed Mr. Hamdan with Detective
14 [REDACTED]. Right?

15 A [MR. [REDACTED]]: Yes.

16 Q [MR. SWIFT]: And a linguist.

17 A [MR. [REDACTED]]: Yes.

18 Q [MR. SWIFT]: Were there any other FBI agents present in that
19 interrogation?

20 A [MR. [REDACTED]]: No.

21 **[END OF PAGE]**

22

23

1 Q [MR. SWIFT]: To your knowledge, were any other FBI agents
2 interrogating Mr. Hamdan at the same time as you were interrogating?
3 Another group of people?

4 A [MR. [REDACTED]]: At the same? I mean, I was there--it couldn't
5 be at the same time.

6 Q [MR. SWIFT]: Let's say you interviewed Mr. Hamdan in the
7 morning. Another group of FBI agents interviewed him in the
8 afternoon.

9 A [MR. [REDACTED]]: Okay.

10 Q [MR. SWIFT]: Did that happen?

11 A [MR. [REDACTED]]: I'm not sure.

12 Q [MR. SWIFT]: It did happen?

13 A [MR. [REDACTED]]: Sure.

14 Q [MR. SWIFT]: You were coordinating your interviews with the
15 other FBI agents?

16 A [MR. [REDACTED]]: We were coordinating our interview efforts
17 through the Joint Operations Center. So we would make our--we were
18 assigned a group of individuals to interview. We would interview
19 those specific individuals.

20 Q [MR. SWIFT]: Were you reviewing other case notes on Mr.
21 Hamdan when you did the interviews?

22 A [MR. [REDACTED]]: There would be a file of Mr. Hamdan of
23 previous interviews that I had read upon my arrival and throughout my

1 time there.

2 Q [MR. SWIFT]: Did you see any other 302s from other FBI agents
3 during your time there while you were interviewing him?

4 A [MR. [REDACTED]]: Yes.

5 Q [MR. SWIFT]: You were interviewing at the same time?

6 A [MR. [REDACTED]]: Yes. Ones from previous sessions with Mr.
7 Hamdan.

8 Q [MR. SWIFT]: At the same time that you were interviewing him
9 based on the file, did anyone else turn in a 302 covering the same
10 time period that you interviewed him? I'm talking about August 27th,
11 August 28th, August 29th, August 30th. Anyone else turning in 302s
12 at the same time?

13 A [MR. [REDACTED]]: Not that I'm aware of.

14 Q [MR. SWIFT]: During your interviews with Mr. Hamdan, did he
15 complain of back pain?

16 A [MR. [REDACTED]]: I don't recall. I mean, it's possible. I
17 don't recall.

18 Q [MR. SWIFT]: Did you do anything to get him medical
19 attention?

20 A [MR. [REDACTED]]: No. I don't think he asked for any medical
21 attention.

22 CDC [MR. SWIFT]: Do you know who--this has previously been
23 marked as Appellate Exhibit 199. I'd like to go ahead first

1 broadcast it to the judge and then to the witness.

2 MJ [CAPT ALLRED]: Very good. You may show the witness.

3 Q [MR. SWIFT]: If you would take a look. This is an excerpt
4 from Mr. Hamdan's medical record on August 28, 2002. And do you know
5 an FBI Agent [REDACTED]?

6 A [MR. W [REDACTED]]: Yeah, I know [REDACTED].

7 Q [MR. SWIFT]: What was he doing here?

8 A [MR. [REDACTED]]: I think [REDACTED] was the--we had a supervisor
9 special agent who kind of oversaw the activities of agents, and I
10 think he was kind of running the actual case. I think he was out of
11 headquarters or Miami. I didn't know [REDACTED] that well, but I knew [REDACTED]
12 through here and my time at Guantanamo.

13 Q [MR. SWIFT]: So does it surprise you to see--was he at
14 Guantanamo at the same time as you were?

15 A [MR. [REDACTED]]: Yeah. He was here upon my arrival. And I'm
16 not sure if he was here upon my departure, but we were here at the
17 same time.

18 Q [MR. SWIFT]: Mr. Hamdan got medical treatment right after you
19 interviewed him per request of the FBI. Did you make that request?

20 A [MR. [REDACTED]]: Not that I recall.

21 Q [MR. SWIFT]: Who could have made it then?

22 A [MR. [REDACTED]]: I don't know.

23

1 Q [MR. SWIFT]: Are you familiar with a publication by the FBI
2 called the GTMO Gazette?

3 A [MR. [REDACTED]]: No.

4 CDC [MR. SWIFT]: This is also from the same appellate exhibit,
5 Your Honor. And if we could go ahead and publish that to the
6 witness?

7 MJ [CAPT ALLRED]: You may.

8 Q [MR. SWIFT]: If you would take a look at paragraph 7.

9 A [MR. [REDACTED]]: Can you lift it up a little bit? It's on the
10 bottom. Okay. Thank you.

11 Okay.

12 Q [MR. SWIFT]: Were you aware that the FBI was now working with
13 medical to ensure that the people that they were interrogating
14 received treatment, or at least front-of-the-line treatment?

15 A [MR. [REDACTED]]: I know that when I interviewed other detainees
16 and they complained about medical problems, they wanted to see the
17 doctor, I would relay that information. But I wasn't in any
18 coordination with medical; I was simply there to interview people.

19 Q [MR. SWIFT]: And so you didn't feel that that was in any way
20 part of the interview process?

21 A [MR. [REDACTED]]: No.

1 Q [MR. SWIFT]: Sounds like it was being touted at the
2 headquarters like a significant interrogation advantage.

3 A [MR. [REDACTED]]: I have no idea who wrote that. I have no
4 idea.

5 Q [MR. SWIFT]: And in Mr. Hamdan's case, it's your testimony
6 that, despite the fact that he got medical treatment per the request
7 of the FBI at the same time that he was being interviewed by you,
8 that is just a coincidence?

9 A [MR. [REDACTED]]: I don't recall Mr. Hamdan complaining of any
10 back injury. Had he done so, it would have been reflected in my
11 notes and probably in my 302.

12 Q [MR. SWIFT]: And you didn't make any request for any medical
13 care?

14 A [MR. [REDACTED]]: Not that I can recall.

15 Q [MR. SWIFT]: And if you had made such a request, you would
16 have put it in your notes?

17 A [MR. [REDACTED]]: Oh, yeah. Absolutely.

18 Q [MR. SWIFT]: By the way, did you take notes when you were
19 making these 302s?

20 A [MR. [REDACTED]]: Yes.

21 Q [MR. SWIFT]: What happened to them?

22 A [MR. [REDACTED]]: They're in a 1-A that I reviewed upon my
23 arrival here at Guantanamo.

1 Q [MR. SWIFT]: I don't think we were furnished a copy of them,
2 but I will check.

3 A [MR. [REDACTED]]: Yeah. I know there are copies.

4 Q [MR. SWIFT]: That we've been----

5 CTC [MR. MURPHY]: ----you have them.

6 CDC [MR. SWIFT]: Okay.

7 Q [MR. SWIFT]: And I just don't have them here.

8 A [MR. [REDACTED]]: Okay.

9 Q [MR. SWIFT]: To your knowledge, in reviewing them, there's no
10 record of him having requested any treatment whatsoever. So this is
11 all some mistake in Mr. Hamdan's medical record that the FBI got him
12 back care?

13 A [MR. [REDACTED]]: I don't think it's a mistake. I just am
14 unaware of the treatment.

15 CDC [MR. SWIFT]: Thank you.

16 WIT [MR. [REDACTED]]: Thank you.

17 CTC [MR. MURPHY]: Your Honor, I do have a little follow-up.

18 The Gazette that you referred to, Mr. Swift, is that
19 numbered with an appellate exhibit?

20 CDC [MR. SWIFT]: Yes, it is. 199.

21 [END OF PAGE]

1 **REDIRECT EXAMINATION**

2 **Question by the trial counsel:**

3 Q [MR. MURPHY]: I believe that on cross-examination, this was
4 referred to as an FBI communication. Is that correct? Is that what
5 was referred to----

6 A [MR. [REDACTED]]: GTMO Gazette. I never heard of it. I have no
7 idea what it is.

8 Q [MR. MURPHY]: But the way the question was posed to you was
9 suggesting that it was an FBI communication of some sort?

10 A [MR. [REDACTED]]: Yes.

11 CTC [MR. MURPHY]: Your Honor, may I approach the witness with a
12 copy of that document?

13 A [MR. [REDACTED]]: Thank you.

14 Q [MR. MURPHY]: I've highlighted the first line in the first
15 paragraph. Could you read that to us?

16 A [MR. [REDACTED]]: We're continuing our assistance to the FBI
17 CITF and, secondly, the DHS interview teams.

18 Q [MR. MURPHY]: Does that suggest from the document's own
19 internal writing that that's coming from the FBI?

20 A [MR. [REDACTED]]: I'm sorry, could you repeat the question?

21 Q [MR. MURPHY]: From what you just read in that first sentence,
22 does that suggest that communication is coming from the FBI?

23 A [MR. [REDACTED]]: No.

1 Q [MR. MURPHY]: It's clearly someone other than the FBI.

2 Right?

3 A [MR. [REDACTED]]: It says--yes, assistance to the FBI. So I
4 would believe it to be someone else.

5 Q [MR. MURPHY]: I don't know who it is, but would you say,
6 based upon your reading of it, the FBI did not generate that?

7 A [MR. [REDACTED]]: From its appearance, yes.

8 Q [MR. MURPHY]: And on the medical entry, do you see anything
9 sinister in that as an FBI agent, that an agent would make a referral
10 for medical assistance?

11 A [MR. [REDACTED]]: No. You know, I was here at Guantanamo
12 interviewing not just Mr. Hamdan, you know, many people. And at
13 times they would say that they would like to see the doctor. And I
14 have no issue with someone wanting to see a doctor. You know, if
15 someone wanted to, I would let--on the way out, let the guards know
16 that I'm done with this person and they complained of something.
17 What happened after that--but it wasn't news. It was actually just
18 to build rapport and to do a nice gesture for someone.

19 Q [MR. MURPHY]: And your testimony is that you never saw
20 anyone, including an FBI agent, somehow leverage whether you get
21 medical care or the quality of medical care with how cooperative they
22 were in an investigation?

23 A [MR. [REDACTED]]: No.

1 CTC [MR. MURPHY]: Your Honor, I believe that is already in the
2 record, 119.

3 MJ [CAPT ALLRED]: 119?

4 CTC [MR. MURPHY]: I'm sorry, 199. Appellate Exhibit 199. I
5 believe defense has it in the record. But if it's not, the
6 government would ask.

7 MJ [CAPT ALLRED]: A few pages ago, I wrote that 199 was Dr.
8 Keram's affidavit. I think the defense was making its argument and
9 asked me to look at it.

10 CDC [MR. SWIFT]: Yes, Your Honor. That's correct. It's
11 attached to Dr. Keram's affidavit.

12 MJ [CAPT ALLRED]: All right. Bailiff, if you could return that
13 to counsel, please **[bailiff did as directed]**.

14 CTC [MR. MURPHY]: Thank you. I have nothing further, Your
15 Honor.

16 MJ [CAPT ALLRED]: Very good. Mr. Swift.

17 CDC [MR. SWIFT]: No, sir.

18 MJ [CAPT ALLRED]: Thank you, sir, for your testimony. You are
19 excused as a witness.

20 WIT [MR. REDACTED]: Thank you.

21 **[The witness was excused and withdrew from the courtroom.]**

22 MJ [CAPT ALLRED]: Okay. 1700.

23 CTC [MR. MURPHY]: I have two more witnesses. They have no

1 exhibits. I think I could get through them in collectively in 25
2 minutes.

3 MJ [CAPT ALLRED]: I doubt it.

4 CTC [MR. MURPHY]: I thought I was very efficient, Your Honor,
5 in moving through this.

6 MJ [CAPT ALLRED]: You are efficient. But two witnesses in 25
7 minutes is the speed of light. You have one witness scheduled for
8 tomorrow morning. Right.

9 CTC [MR. MURPHY]: We could put them on tomorrow's schedule.

10 MJ [CAPT ALLRED]: So you now have three for tomorrow morning?

11 CTC [MR. MURPHY]: Three witnesses for tomorrow. Yes, sir.

12 MJ [CAPT ALLRED]: I think we've had enough for today. Why
13 don't we call it a day, and reconvene tomorrow morning at 9:00.

14 Is there anything else that we should discuss before we adjourn
15 for the evening?

16 CTC [MR. MURPHY]: Not from the government, Your Honor.

17 CDC [MR. SWIFT]: No, sir.

18 MJ [CAPT ALLRED]: Okay. Why don't we adjourn for the evening?

19 **[The R.M.C. 803 session recessed at 1657, 16 July, 2008.]**

20 **[END OF PAGE]**

21

22

23

1 **[The R.M.C. 803 session was called to order at 0907, 17 July 2008.]**

2 MJ [CAPT ALLRED]: Court is called to order. All parties
3 present when the court recessed are once again present. Let's see, I
4 think we were about to call some more government witnesses. Weren't
5 we?

6 CTC [MR. MURPHY]: Yes, Your Honor. We have three witnesses
7 remaining. They're all in the jury deliberation room. We can get
8 them quickly. And the government would call at this time Mr.
9 [REDACTED].

10 MJ [CAPT ALLRED]: Mr. [REDACTED]?

11 CTC [MR. MURPHY]: [REDACTED]. [REDACTED]

12 MJ [CAPT ALLRED]: Very good. I will have the bailiff call him.

13 **[The witness was called by the bailiff and entered the courtroom.]**

14 CTC [MR. MURPHY]: Mr. [REDACTED], if you could approach the
15 witness stand, face me, and raise your right hand.

16 [REDACTED], Civilian, was called as a witness for the
17 prosecution, was sworn, and testified as follows:

18 CTC [MR. MURPHY]: Please be seated **[witness complied.]**

19 **DIRECT EXAMINATION**

20 **Question by the trial counsel:**

21 Q [MR. MURPHY]: Would you state your full name, and spell your
22 last name for the record.

23 A [MR. [REDACTED]]: [REDACTED]. Last name, [REDACTED].

1 Q [MR. MURPHY]: Who are you employed by, and what are your
2 duties?

3 A [MR. [REDACTED]]: Right now, I'm employed by the Department of
4 State. But at the time I was down in Cuba, I was employed as a
5 member of the United States Army Criminal Investigation Command. I
6 was a special agent.

7 Q [MR. MURPHY]: All right. I'm going to skip through your
8 background and training at this time, and just ask you specifically,
9 did you receive an assignment to interview Mr. Hamdan?

10 A [MR. [REDACTED]]: Yes, I did.

11 Q [MR. MURPHY]: And when did you get that assignment?

12 A [MR. [REDACTED]]: That would have been January 2003.

13 Q [MR. MURPHY]: And did you in fact interview him, with other
14 people?

15 A [MR. [REDACTED]]: Yes, I did.

16 Q [MR. MURPHY]: I'd like you to look around the courtroom today
17 and see if you recognize Mr. Hamdan?

18 A [MR. [REDACTED]]: Yes, sir. The guy over at defense table with
19 the white scarf **[pointing to the accused]**.

20 Q [MR. MURPHY]: I was going to ask, would you point to him and
21 identify an article of clothing he is wearing?

22 A [MR. [REDACTED]]: White scarf.

1 CTC [MR. MURPHY]: May the record reflect, Your Honor, that the
2 witness has properly identified the accused in this case?

3 MJ [CAPT ALLRED]: Very well.

4 Q [MR. MURPHY]: During what time period did you interview the
5 accused?

6 A [MR. [REDACTED]]: That would have been January 14, 2003.

7 Q [MR. MURPHY]: And you mentioned in Cuba. At Guantanamo Bay
8 is the location you interviewed him?

9 A [MR. [REDACTED]]: Yes, sir.

10 Q [MR. MURPHY]: Approximately, how many times did you interview
11 him?

12 A [MR. [REDACTED]]: Only once.

13 Q [MR. MURPHY]: Could you describe the room where the interview
14 took place?

15 A [MR. [REDACTED]]: We were in a modified double-wide trailer, a
16 corridor down the middle. There was interview rooms left and right.
17 The interview was probably about 8 by 10, one entrance in, no windows
18 outside. I think there was maybe a one-way glass for observation,
19 and just a few chairs and a table.

20 Q [MR. MURPHY]: Who was with you during the interview?

21 A [MR. [REDACTED]]: There was another agent and a translator.

22 Q [MR. MURPHY]: The interview was conducted in Arabic?

23 A [MR. [REDACTED]]: Yes, sir.

1 Q [MR. MURPHY]: Sir, you do not speak Arabic?

2 A [MR. [REDACTED]]: No, sir.

3 Q [MR. MURPHY]: Could you explain the process whereby there was
4 a translation for you.

5 A [MR. [REDACTED]]: We posed a question. The translator--we
6 posed the question in English. The translator would translate it.
7 And then there would be--there would be an answer, and it would be
8 translated back to us.

9 Q [MR. MURPHY]: Using this process, were you able to understand
10 what Mr. Hamdan was telling you?

11 A [MR. [REDACTED]]: Yes, sir.

12 Q [MR. MURPHY]: How close were you and the other people in the
13 room to Mr. Hamdan?

14 A [MR. [REDACTED]]: Approximately, three to four feet.

15 Q [MR. MURPHY]: How would you describe the tone of your
16 interviews with him?

17 A [MR. [REDACTED]]: It was cordial.

18 Q [MR. MURPHY]: I'm going to ask you to define, as you would
19 define, the phrase "open-ended questions," and then ask you if those
20 were the types of questions you asked Mr. Hamdan.

21 A [MR. [REDACTED]]: Open-ended question would be a question we
22 posed that would need more than a "yes" or "no" answer.

1 Q [MR. MURPHY]: And were those the types of questions you posed
2 to Mr. Hamdan?

3 A [MR. [REDACTED]]: Yes, sir.

4 Q [MR. MURPHY]: Did you or anyone else in the room ever yell at
5 Mr. Hamdan or act in any manner that you would consider to be
6 threatening?

7 A [MR. [REDACTED]]: No.

8 Q [MR. MURPHY]: Did Mr. Hamdan tell you at any time he was
9 abused, mistreated, or tortured by anyone at any time?

10 A [MR. [REDACTED]]: No.

11 Q [MR. MURPHY]: What would you have done if you had received a
12 report of abuse or mistreatment by Mr. Hamdan?

13 A [MR. [REDACTED]]: We would have reported it.

14 Q [MR. MURPHY]: Did you have an opportunity to watch the
15 detention facility, see the detention facility and the guards
16 working?

17 A [MR. [REDACTED]]: Only minimal movements of them bringing
18 someone to be interviewed.

19 Q [MR. MURPHY]: How would you describe that?

20 A [MR. [REDACTED]]: Very organized. I mean, nothing out of the
21 ordinary.

1 Q [MR. MURPHY]: Did you see anything that would constitute
2 mistreatment or abuse by the guards?

3 A [MR. [REDACTED]]: No.

4 Q [MR. MURPHY]: Did you ever hear any reports that the guards
5 were abusing detainees in any manner?

6 A [MR. [REDACTED]]: No.

7 Q [MR. MURPHY]: Did Mr. Hamdan ever tell you he was forced to
8 speak against his will or that he made up false information?

9 A [MR. [REDACTED]]: No.

10 Q [MR. MURPHY]: During your interviews, did you provide him
11 with the opportunity to eat and drink?

12 A [MR. [REDACTED]]: No, we didn't. Only because we only talked
13 to him one time.

14 Q [MR. MURPHY]: Okay. Did he indicate a willingness to talk to
15 you?

16 A [MR. [REDACTED]]: It was--it was kind of that I would--"I will
17 talk to you if I can make a phone call." He had mentioned that to us
18 right away.

19 Q [MR. MURPHY]: Explain that a little more for us. What was
20 your observations in that regard?

21 A [MR. [REDACTED]]: It was just that the first part of the
22 interview, he'd kind of talked about his willingness to talk to us;

1 he would talk to us if he could make a phone call. And he kind of
2 indicated that he had made a phone call in the past.

3 Q [MR. MURPHY]: All right. What did you say and what did you
4 do as a result of him saying that?

5 A [MR. [REDACTED]]: This was the first time we talked to him. So
6 we said we would have to check on that.

7 Q [MR. MURPHY]: All right. Did you assist him in any phone
8 call in any manner?

9 A [MR. [REDACTED]]: No. Because that was the only time we talked
10 to him.

11 Q [MR. MURPHY]: All right. Even though you didn't provide him
12 with a phone call at the time, did he indicate a willingness to
13 answer your questions?

14 A [MR. [REDACTED]]: Yes. I mean, he continued to talk to us.

15 Q [MR. MURPHY]: Did you provide him with any rights
16 advisements, Article 31 warnings under the UCMJ or Miranda-type
17 warnings?

18 A [MR. [REDACTED]]: No.

19 Q [MR. MURPHY]: And why was that?

20 A [MR. [REDACTED]]: There was no policy for us to advise him of
21 his rights.

1 Q [MR. MURPHY]: Was it clear to you as an investigator in the
2 case that Mr. Hamdan was free to either talk to you or not to talk to
3 you as he chose?

4 A [MR. [REDACTED]]: Yes.

5 Q [MR. MURPHY]: And how was that made clear to you?

6 A [MR. [REDACTED]]: That was--well, we couldn't make him talk to
7 us. And if he wanted to talk to us, that was fine. If he didn't, he
8 was not forced to talk to us. So it was his option.

9 Q [MR. MURPHY]: How long did your one interview last?

10 A [MR. [REDACTED]]: I think it was approximately one hour.

11 Q [MR. MURPHY]: Was it important to you as an investigator that
12 the information you got from Mr. Hamdan was both reliable and
13 accurate?

14 A [MR. [REDACTED]]: Yes.

15 Q [MR. MURPHY]: Why was that?

16 A [MR. [REDACTED]]: As part of any investigation, you want to get
17 truthful information.

18 Q [MR. MURPHY]: Did you record a summary of your interview with
19 Mr. Hamdan on an either CITF form 40 or an FBI form 302?

20 A [MR. [REDACTED]]: Yes, we did.

21 Q [MR. MURPHY]: Okay. Which one was it?

22 A [MR. [REDACTED]]: It should have been both.

1 Q [MR. MURPHY]: Both. Okay. And does that summarize your
2 interview with Mr. Hamdan?

3 A [MR. [REDACTED]]: Yes, it does.

4 Q [MR. MURPHY]: Have you read that in preparation for your
5 testimony today?

6 A [MR. [REDACTED]]: Yes, I have.

7 Q [MR. MURPHY]: All right. I'd like to go over some
8 allegations that have come up, and ask you if you have any
9 information at all about any of these. I will go through the
10 complete list, and then I will ask you at the end.

11 Did you learn from anyone at any time of an allegation that
12 personal property was taken away from Mr. Hamdan to help facilitate
13 the interviews with interviewers? That medical care was either
14 provided or not provided, depending on the success or lack of success
15 of interviews? That an interviewer abused Mr. Hamdan, either male or
16 female, by touching his groin? That he was sent to solitary
17 confinement to facilitate the interview process? Or, that he was
18 abused in Bagram by a soldier placing a knee in the back of Mr.
19 Hamdan? Or, that he was threatened to be killed in Kandahar, or that
20 he was shoved with a gun in a threatening manner in Kandahar?

21 Do you have any information on any of those allegations?

22 A [MR. [REDACTED]]: No, I don't.

1 Q [MR. MURPHY]: A couple of other allegations.

2 That Mr. Hamdan saw an Afghani local force member shoot an
3 Arab, and because of that he felt threatened by U.S. forces or
4 special agents. That Mr. Hamdan made up false information for
5 Federal agents about transporting weapons. That after someone placed
6 a hood over his head, he felt that he would be killed. After
7 allegedly seeing detainees beaten in Bagram, he believed that his
8 survival depended on cooperating with U.S. officials. After he
9 allegedly saw detainees beaten and left on a tarmac somewhere, was
10 exposed to extreme cold, and that caused him to believe that he was
11 at the mercy of U.S. agents.

12 Do you have any information about any of those allegations?

13 A [MR. ██████████]: No, I don't.

14 Q [MR. MURPHY]: Can you provide us with a summary of what Mr.
15 Hamdan did then?

16 A [MR. ██████████]: Pretty much asking about the financing of the
17 camps. And he pretty much told us he didn't have any information;
18 that he was----

19 Q [MR. MURPHY]: ----And let me just jump in. When you said the
20 camps, what are you referring to?

21 A [MR. ██████████]: The training camps.

22 Q [MR. MURPHY]: The al Qaeda training camps?

23 A [MR. ██████████]: Yes.

1 Q [MR. MURPHY]: Okay. Please continue.

2 A [MR. [REDACTED]]: He stated that just because he was bin
3 Laden's driver, that he didn't know anything--or didn't know
4 everything. And we asked him about how he was paid, and he related
5 that a lot of people in Afghanistan had different kinds of currency,
6 you know, if they were traveling or whatever, so it was kind of a
7 dumb question.

8 The other thing was about the phone, about wanting to make
9 a phone call home.

10 Q [MR. MURPHY]: Did he indicate who paid him?

11 A [MR. [REDACTED]]: He did say that bin Laden paid him.

12 Q [MR. MURPHY]: Personally?

13 A [MR. [REDACTED]]: Yes.

14 Q [MR. MURPHY]: And at the trial, could you provide even
15 greater details about your interview with Mr. Hamdan?

16 A [MR. [REDACTED]]: Pardon me?

17 Q [MR. MURPHY]: In other words, at trial, if I asked you even
18 more detailed questions, could you provide more detail at that time?

19 A [MR. [REDACTED]]: It would be pretty much what's in the 302.

20 Q [MR. MURPHY]: Okay.

21 CTC [MR. MURPHY]: Your Honor, I would tender the witness.

22 MJ [CAPT ALLRED]: Thank you.

1 **CROSS-EXAMINATION**

2 **Question by the defense counsel:**

3 Q [MR. SWIFT]: Before beginning your interview with Mr.--first,
4 let me introduce myself. My name is Charlie Swift, and I'm one of
5 the defense counsel for Mr. Hamdan.

6 Before beginning your interview with Mr. Hamdan, did you
7 tell him why you were there?

8 A [MR. [REDACTED]]: Yes.

9 Q [MR. SWIFT]: You told him the purpose of your interview?

10 A [MR. [REDACTED]]: Yes.

11 Q [MR. SWIFT]: And what did you tell him?

12 A [MR. [REDACTED]]: It was to talk about the financing of the
13 training camps.

14 Q [MR. SWIFT]: At that time, did you consider him a criminal
15 suspect?

16 A [MR. [REDACTED]]: Part of an investigation.

17 Q [MR. SWIFT]: Was this for intelligence purposes, or was there
18 an ongoing criminal investigation against Mr. Hamdan?

19 A [MR. [REDACTED]]: I guess you would say criminal.

20 Q [MR. SWIFT]: Did you tell him that there was an ongoing
21 criminal investigation against him, and you were going to ask him
22 questions about it?

23 A [MR. [REDACTED]]: I don't remember how that was phrased.

1 Q [MR. SWIFT]: Do you think that it's possible you told him
2 that you were investigating crimes that he might have committed?

3 A [MR. [REDACTED]]: It's possible.

4 Q [MR. SWIFT]: Now, during your conversation with him, did you
5 tell him that he could stop the interview at any time if he wanted
6 to?

7 A [MR. [REDACTED]]: Yes.

8 Q [MR. SWIFT]: And you were asked questions about particular
9 incidents of potential abuse against Mr. Hamdan. Did you ever go
10 into Camp Delta?

11 A [MR. [REDACTED]]: I think maybe one time. Well, you're talking
12 into the cell area. Right?

13 Q [MR. SWIFT]: That's correct.

14 A [MR. [REDACTED]]: I think one time.

15 Q [MR. SWIFT]: Were you in Afghanistan between November of 2001
16 and June of 2002?

17 A [MR. [REDACTED]]: No, I wasn't.

18 Q [MR. SWIFT]: Were you in Guantanamo in May and June of 2003?

19 A [MR. [REDACTED]]: No. No, I wasn't.

20 Q [MR. SWIFT]: Did you ask Mr. Hamdan any questions about
21 whether he'd been abused?

22 A [MR. [REDACTED]]: I don't think we did.

1 Q [MR. SWIFT]: Did you identify yourself to Mr. Hamdan?

2 A [MR. ██████████]: Yes.

3 Q [MR. SWIFT]: By name?

4 A [MR. ██████████]: Yes.

5 Q [MR. SWIFT]: By position?

6 A [MR. ██████████]: Both.

7 Q [MR. SWIFT]: So he knew that you were an Army investigator?

8 A [MR. ██████████]: Yes.

9 CDC [MR. SWIFT]: No further questions.

10 CTC [MR. MURPHY]: Your Honor, the government has nothing
11 further.

12 MJ [CAPT ALLRED]: Very good. Thank you, Mr. ██████████, for your
13 testimony. You may be excused.

14 CTC [MR. MURPHY]: Your Honor, the government would ask if Mr.
15 ██████████ could ask Special Agent ██████████ to come in next.

16 **[The witness was excused and withdrew from the courtroom.]**

17 **[The next witness entered the courtroom.]**

18 CTC [MR. MURPHY]: Special Agent ██████████, if you could approach
19 the witness stand and face me, and raise your right hand. I will
20 swear you in.

21 **[END OF PAGE]**

1 [REDACTED], Civilian, was called as a witness for the
2 prosecution, was sworn, and testified as follows:

3 CTC [MR. MURPHY]: Please be seated.

4 [The witness did as directed.]

5 DIRECT EXAMINATION

6 Question by the trial counsel:

7 Q [MR. MURPHY]: Would you state your full name and spell your
8 last name for the record.

9 A [MR. [REDACTED]]: [REDACTED]

10 Q [MR. MURPHY]: Who are you employed by, and what are your
11 duties?

12 A [MR. [REDACTED]]: I'm a special agent with the Federal Bureau of
13 Investigation. And I investigate crime or any other thing that the
14 U.S. government has a party to.

15 Q [MR. MURPHY]: I'm going to skip past your background and
16 training in law enforcement for purposes of this motion, and ask you,
17 did you receive an assignment to interview Mr. Salim Hamdan?

18 A [MR. [REDACTED]]: Yes, I did.

19 Q [MR. MURPHY]: When did you get that assignment?

20 A [MR. [REDACTED]]: I was at Guantanamo Bay between February and I
21 believe the last of March 2003. And I believe that assignment came
22 probably around the latter part of February 2003.

1 Q [MR. MURPHY]: And did you in fact interview him in person,
2 with others?

3 A [MR. [REDACTED]]: Yes, I did.

4 Q [MR. MURPHY]: I'd like you to look around the courtroom
5 today, and ask if you recognize Salim Hamdan.

6 A [MR. [REDACTED]]: Yes, I do.

7 Q [MR. MURPHY]: If so, can you identify him, and point to
8 him--point to him, and identify an article of clothing he is wearing?

9 A [MR. [REDACTED]]: He's the gentleman sitting with the headphones
10 on, wear the tan jacket and the white headdress **[pointing to the**
11 **accused]**.

12 CTC [MR. MURPHY]: May the record reflect, Your Honor, that the
13 witness has properly identified the accused in this case.

14 MJ [CAPT ALLRED]: Very well.

15 Q [MR. MURPHY]: During what time period did you interview the
16 accused?

17 A [MR. [REDACTED]]: I believe it was February 26, 2003.

18 Q [MR. MURPHY]: And where did you interview him?

19 A [MR. [REDACTED]]: At Camp Delta.

20 Q [MR. MURPHY]: Approximately, how many times did you interview
21 him?

22 A [MR. [REDACTED]]: I believe once.

1 Q [MR. MURPHY]: Could you describe the room that the interview
2 took place.

3 A [MR. ██████]: We were conducting interviews in what I would
4 call modular-type buildings, pre-fabbed constructed buildings that
5 were divided into interview rooms. It had a central hallway and
6 rooms going off to the sides.

7 Q [MR. MURPHY]: Who were in the interview rooms with you?

8 A [MR. ██████]: On that interview, I was interviewing with a
9 member of the Navy Criminal Justice--or, Criminal Investigative
10 Service, and also that we had an Arabic interpreter.

11 Q [MR. MURPHY]: The interview occurred and was conducted in
12 Arabic?

13 A [MR. ██████]: Yes, sir.

14 Q [MR. MURPHY]: And was there a translation process whereby you
15 could understand what Mr. Hamdan was saying?

16 A [MR. ██████]: Yes, sir.

17 Q [MR. MURPHY]: Describe that process for us.

18 A [MR. ██████]: The translator was directed to translate
19 anything Mr. Hamdan said to me in English. And then whenever I
20 wanted to address Mr. Hamdan, I would speak in English, and the
21 interpreter would translate it into Arabic so that Mr. Hamdan could
22 understand what was being said.

1 Q [MR. MURPHY]: Using this process, were you able to understand
2 what Mr. Hamdan was saying?

3 A [MR. ██████]: Yes, sir.

4 Q [MR. MURPHY]: Please tell us about the seating arrangements
5 in that room and how close you were seated, or how close everybody
6 was seated, to Mr. Hamdan.

7 A [MR. ██████]: Normally--and I believe this interview fell
8 into the normal parameters, Mr. Hamdan or whoever was being
9 interviewed would be seated in a chair, and I would be on one si--
10 diagonal from him, the other interviewer would be diagonally--and
11 usually the interpreter would sit either to his left or right.

12 Q [MR. MURPHY]: Okay. How close in distance were you all?

13 A [MR. ██████]: Probably from me to this table here would
14 probably be the distance.

15 Q [MR. MURPHY]: Could you give us a feet estimate on that?

16 A [MR. ██████]: Two feet.

17 Q [MR. MURPHY]: How would you describe the tone of your
18 interview with Mr. Hamdan?

19 A [MR. ██████]: I would say it was business. Business-like.
20 Relaxed.

21 [END OF PAGE]

1 Q [MR. MURPHY]: I'm going to ask you to define the phrase
2 "open-ended question," and then tell me whether that was the type of
3 questions you asked Mr. Hamdan?

4 A [MR. ██████]: An open-ended question would be a question
5 where it would have to be answered in more than a yes or no. It
6 would have to have more than a yes or no answer.

7 Q [MR. MURPHY]: And was that the type of questions you asked
8 Mr. Hamdan?

9 A [MR. ██████]: Some of them. Some questions were open-ended,
10 some of them were not open-ended. Some of them required a yes or no.
11 Some of them required him to expand upon his answer.

12 Q [MR. MURPHY]: Okay. At any point during the interview, did
13 you or anyone else yell at Mr. Hamdan or act in any manner that you
14 would consider threatening?

15 A [MR. ██████]: No, sir.

16 Q [MR. MURPHY]: During the interviews, did Mr. Hamdan ever tell
17 you that he was abused, mistreated, or tortured by anyone at any
18 time?

19 A [MR. ██████]: Not that I can recall.

20 Q [MR. MURPHY]: If you had a report by Mr. Hamdan that there
21 was abuse, what would you have done with that information?

22 A [MR. ██████]: I would have documented it in my 302. And I
23 would also have notified my supervisor that this had been brought up.

1 Q [MR. MURPHY]: Did you have an opportunity to observe the
2 detention facility and the guards who were working there?

3 A [MR. ██████████]: Yes, sir.

4 Q [MR. MURPHY]: Did you see anything involving the guards that
5 you would consider to be abuse or mistreatment of any detainee,
6 including Mr. Hamdan?

7 A [MR. ██████████]: No, sir.

8 Q [MR. MURPHY]: Did Mr. Hamdan ever tell you that he was forced
9 to speak against his will, or that he made up information for any
10 reason?

11 A [MR. ██████████]: No, sir. He did not.

12 Q [MR. MURPHY]: Did Mr. Hamdan indicate a willingness to talk?

13 A [MR. ██████████]: He spoke freely. We did not have a lengthy
14 conversation, but the conversation that we did have was freely given.

15 Q [MR. MURPHY]: Did you provide Mr. Hamdan with any rights
16 advisements?

17 A [MR. ██████████]: No.

18 Q [MR. MURPHY]: Such as Article 31 warnings under the UCMJ or
19 Miranda-type warnings?

20 A [MR. ██████████]: No, sir, I did not.

21 [END OF PAGE]

1 Q [MR. MURPHY]: Why was that?

2 A [MR. ██████]: Because the interview that we were conducting
3 with Mr. Hamdan didn't call for a Miranda warning, which is what we
4 would normally give.

5 Q [MR. MURPHY]: Was it clear to you during your interviews that
6 Mr. Hamdan was free to either talk to you or not talk to you during
7 your interview?

8 A [MR. ██████]: Yes, sir.

9 Q [MR. MURPHY]: How long did the interview last?

10 A [MR. ██████]: I can't recall exactly. But I would say
11 probably it lasted--from the time that he was brought in until the
12 time he left, I would say it probably lasted 15, 20 minutes.

13 Q [MR. MURPHY]: Did you document your interview with an FBI
14 302?

15 A [MR. ██████]: Yes, sir, I did.

16 Q [MR. MURPHY]: And have you reviewed that in preparation for
17 your testimony today?

18 A [MR. ██████]: Yes, sir, I did.

19 [END OF PAGE]

20

21

22

1 Q [MR. MURPHY]: I'm going to go through a list of allegations
2 that have been raised, and I'm going to go through the complete list
3 and then ask you at the end if you would comment if you have heard
4 from anyone, anything, about these allegations. And they include the
5 following:

6 That personal property was taken away from Mr. Hamdan
7 before interviews to facilitate the interview process. That medical
8 care was either provided or not provided in order to assist in the
9 interview process. That a guard abused him, either male or female,
10 with a specific allegation that a guard touched him in the groin.
11 That he was placed in solitary confinement in order to facilitate the
12 interviews. While at Bagram, a soldier put his knee in Mr. Hamdan's
13 back. While in Kandahar, he was threatened to be killed. And,
14 specifically in Kandahar, he was shown a gun in a threatening manner.

15 Do you know anything about any aspects of those
16 allegations?

17 A [MR. ████████]: No, sir. I have no personal knowledge.

18 [END OF PAGE]

1 Q [MR. MURPHY]: Let me run through a few more as well.
2 That Mr. Hamdan claims that he saw an Afghani local force member
3 shoot an Arab, and because of that he felt threatened by U.S. forces
4 or special agents. That Mr. Hamdan claims that he made up false
5 information to federal agents about transporting weapons. That by
6 placing a hood over his head he thought he was about to be killed.
7 That he alleges detainees were beaten in Bagram, and as a result his
8 survival depended on cooperating with U.S. officials. And, finally,
9 that he saw detainees allegedly beaten and lying on a tarmac
10 somewhere in extreme cold, and that this caused him to believe that
11 he was at the mercy of U.S. agents.

12 Do you have any information about any of those allegations?

13 A [MR. ████████]: No, sir.

14 Q [MR. MURPHY]: All right. Can you briefly tell us a summary
15 of your interview with Mr. Hamdan and what took place?

16 A [MR. ████████]: The reason I interviewed Mr. Hamdan was a
17 directive to ask if he was familiar with Al-Libi, and also about
18 attending Al-Farouq training camps.

19 Q [MR. MURPHY]: Okay. And what happened as a result of you
20 posing those questions?

21 A [MR. ████████]: Mr. Hamdan stated that he did not know who
22 Al-Libi was. We had showed him a photograph was the way that we
23 asked him about that. And he stated that he had not attended the

1 Al-Farouq training camps; however, he had driven bin Laden to there
2 several times, I believe is the phrase that he used. And any other
3 questions that we had, he said, was in the file that he had already
4 been interviewed before on.

5 Q [MR. MURPHY]: Say that--I missed that last part. Any other
6 questions you had?

7 A [MR. ██████]: Any other questions that we had were--he said
8 were in the file, which was a common response that we got.

9 Q [MR. MURPHY]: All right. At that point, did he decline to
10 continue with the interview?

11 A [MR. ██████]: Yes, sir. There was nothing else that--he did
12 not want to talk any more about the answers that he had given, and he
13 had nothing else that he wanted to talk about.

14 Q [MR. MURPHY]: Did you respect his decision not to talk
15 further?

16 A [MR. ██████]: Yes, sir.

17 Q [MR. MURPHY]: And what did you do once you learned that was
18 his position?

19 A [MR. ██████]: Once we were certain that he had nothing else
20 to give us and nothing else he wanted to talk about, we concluded the
21 interview, notified the guards, and they then escorted him back to
22 his cell.

1 Q [MR. MURPHY]: All right. And that was the last of your
2 involvement with Mr. Hamdan?

3 A [MR. ██████████]: Yes, sir.

4 CTC [MR. MURPHY]: Your Honor, we would tender the witness.

5 MJ [CAPT ALLRED]: Very good.

6 **CROSS-EXAMINATION**

7 **Question by the defense counsel:**

8 Q [MR. SWIFT]: Good morning.

9 A [MR. ██████████]: Good morning.

10 Q [MR. SWIFT]: My name is Charlie Swift, and I'm one of Mr.
11 Hamdan's defense counsels.

12 A [MR. ██████████]: Yes, sir.

13 Q [MR. SWIFT]: This interview was in February of 2003. Is that
14 correct?

15 A [MR. ██████████]: Yes, sir.

16 Q [MR. SWIFT]: And during this interview, Mr. Hamdan denied
17 going to Al-Farouq training camps. Is that correct? Denied
18 attending Al-Farouq training camps.

19 A [MR. ██████████]: He stated that he had not attended training
20 there, but that he had driven UBL there several times, I believe is
21 the phrasing that he gave.

1 Q [MR. SWIFT]: Had you reviewed his file previously to
2 conducting the interview?

3 A [MR. [REDACTED]]: Yes, sir.

4 Q [MR. SWIFT]: Was that consistent with his earlier answers?

5 A [MR. [REDACTED]]: I cannot recall.

6 Q [MR. SWIFT]: What was Mr. Hamdan's demeanor for the interview
7 in February?

8 A [MR. [REDACTED]]: He was compliant. He was there. He stated, I
9 forget, I believe at the beginning that he really had nothing to say
10 to us because everything was in the file; it had been gone over
11 before. And then when we posed the specific questions to him and
12 showed him the photo, he looked at the photo and said he didn't know
13 who he was. And then when we asked him about the Al-Farouq training
14 camp, he said that he had never attended training there, and went
15 into, however, he had driven UBL there several times. So I would say
16 that he was compliant.

17 Q [MR. SWIFT]: Did he seem interested in answering any other
18 questions?

19 A [MR. [REDACTED]]: Interested, I wouldn't say whether he--if we
20 had other questions, specific questions, I would think that he would
21 give us an answer one way or the other. But we didn't have any to
22 pose at him at that time. He didn't seem to want to expand on--I
23 believe we did follow-up questions, you know, how many times

1 specifically? And he wouldn't give us specifics. But he answered
2 them generally.

3 Q [MR. SWIFT]: He answered those two general questions. But
4 after that, he pretty much stuck to his original answer: It's in the
5 file?

6 A [MR. [REDACTED]]: Yes, sir.

7 Q [MR. SWIFT]: It's in the file. You've already asked me?

8 A [MR. [REDACTED]]: Well, it's already been asked before.

9 Q [MR. SWIFT]: So, in February of 2003, would you characterize
10 him as cooperative?

11 A [MR. [REDACTED]]: Yes, sir. To an extent, but yes.

12 Q [MR. SWIFT]: To a point?

13 A [MR. [REDACTED]]: Yes, sir.

14 CDC [MR. SWIFT]: Thank you. No further questions.

15 CTC [MR. MURPHY]: Your Honor, we have no further questions.

16 MJ [CAPT ALLRED]: Very good. Thank you, Special Agent [REDACTED].
17 You may withdraw.

18 CTC [MR. MURPHY]: Your Honor, we would call Special Agent
19 [REDACTED], and with the Court's permission, ask Agent [REDACTED] if
20 he could ask Agent [REDACTED] to come in.

21 **[The witness was excused and withdrew from the courtroom.]**

22 **[The next witness entered the courtroom.]**

1 Q [MR. MURPHY]: Would you tell us a little bit about your
2 language training.

3 A [MR. [REDACTED]]: Yes. I attended the Defense Language
4 Institute in Monterey, California for studies in modern standard
5 Arabic, as well as follow-on dialect training. And in addition to
6 that, I was also sent to Brigham Young University for specialized
7 training in North African dialects of Arabic.

8 Q [MR. MURPHY]: And you can understand conversational Arabic.
9 Is that correct?

10 A [MR. [REDACTED]]: Conversational Arabic. But depending on how
11 much time I spend outside of the Middle East or in daily immersion in
12 Arabic, varying degrees.

13 Q [MR. MURPHY]: Okay. Did you receive an assignment to
14 interview Salim Hamdan?

15 A [MR. [REDACTED]]: Yes, sir.

16 Q [MR. MURPHY]: And when did you get that assignment?

17 A [MR. [REDACTED]]: That was in May of 2003.

18 Q [MR. MURPHY]: Did you in fact interview him in person, with
19 others?

20 A [MR. [REDACTED]]: Yes, sir, I did.

21 Q [MR. MURPHY]: I would ask you to look around the courtroom,
22 and see if you recognize Mr. Hamdan today.

23 A [MR. [REDACTED]]: Yes, sir.

1 Q [MR. MURPHY]: If you could, could you point to him and
2 identify an article of clothing he's wearing.

3 A [MR. [REDACTED]]: Yes. Salim is wearing a sport jacket over
4 his thawb, white thawb. And has a white headdress ghutra that he is
5 wearing [pointing to the accused].

6 CTC [MR. MURPHY]: Your Honor, may the record reflect that the
7 witness has properly identified the accused in this case.

8 MJ [CAPT ALLRED]: It may.

9 Q [MR. MURPHY]: During what time period did you interview the
10 accused?

11 A [MR. [REDACTED]]: Specifically, it was I believe 17th of May
12 2003, and then at least one additional follow-up approximately a week
13 after that.

14 Q [MR. MURPHY]: Where did you interview him?

15 A [MR. [REDACTED]]: That was in Camp Delta here at Naval Station
16 Guantanamo Bay.

17 Q [MR. MURPHY]: And your recollection is about two times. Is
18 that right?

19 A [MR. [REDACTED]]: Yes, sir.

20 Q [MR. MURPHY]: Could be more or less, but that's the
21 approximation?

22 A [MR. [REDACTED]]: That's correct.

1 Q [MR. MURPHY]: Could you describe the room or rooms that the
2 interviews took place?

3 A [MR. [REDACTED]]: The interview took place in the standard
4 interview room at the time in Camp Delta, in a pre-fabricated
5 trailer. I would describe the interview room as approximately 10 by
6 12 feet, carpet on the floor. Typically, there was a table, folding
7 chairs, and an air conditioner with climate control.

8 Q [MR. MURPHY]: Were there other people in the room with you?

9 A [MR. [REDACTED]]: Yes.

10 Q [MR. MURPHY]: And who were they?

11 A [MR. [REDACTED]]: There was my partner at the time, a former
12 special agent with the FBI, [REDACTED] and myself, and Salim, and
13 that was it.

14 Q [MR. MURPHY]: And agent [REDACTED] is a native fluent Arabic
15 speaker. Is that correct?

16 A [MR. [REDACTED]]: That's correct. He was born and raised in
17 Lebanon.

18 Q [MR. MURPHY]: Where the two of you both speak Arabic, was
19 there any kind of translation process during these interviews?

20 A [MR. [REDACTED]]: Yes. Where there were periods or portions of
21 the interview where I needed some additional clarification of
22 translation, [REDACTED] as a native speaker provided that.

1 Q [MR. MURPHY]: Utilizing this approach, were you able to
2 understand everything that Salim Hamdan said to you?

3 A [MR. ██████████]: Yes, sir. Generally, again, with assistance
4 where needed from Mr. ██████████.

5 Q [MR. MURPHY]: Could you describe the seating arrangements and
6 how close all of you were to Mr. Hamdan.

7 A [MR. ██████████]: When Salim entered the room, after greetings
8 with him in local fashion, I asked him if he preferred to sit in the
9 chairs or on the floor. And Salim said he would prefer to sit on the
10 floor. So Mr. ██████████ and myself moved the chairs and table out of
11 the way, and we conducted the entire interview seated on the floor,
12 sometimes actually reclining on the floor with Salim.
13 As far as the arrangements and physical space, again, in accordance
14 with Arabic--or Arab, I should say, and Yemeni customs, anywhere from
15 a foot to two, or sometimes knee to knee, elbow to elbow.

16 Q [MR. MURPHY]: And that's culturally acceptable. Is that your
17 understanding?

18 A [MR. ██████████]: That's my understanding. Yes, sir.

19 Q [MR. MURPHY]: And it was Mr. Hamdan's decision to conduct the
20 interview on the floor?

21 A [MR. ██████████]: Right. We provided that offer to him, and he
22 requested to sit on the floor.

1 Q [MR. MURPHY]: How would you describe the tone of the
2 interviews with Mr. Hamdan?

3 A [MR. [REDACTED]]: I would describe it as cordial, friendly, and
4 conversational. Overall, as much as anything, an extended
5 conversation.

6 Q [MR. MURPHY]: I'm going to ask you to define, as you would
7 define it, the phrase "open-ended question," and then ask you if that
8 was the type of question you put to Mr. Hamdan.

9 A [MR. [REDACTED]]: An open-ended question is a question that
10 would facilitate an unguided or spontaneous response. And according
11 to the way I typically conduct interviews, an open-ended question
12 more often is the type of question. But, of course, there are direct
13 questions. But most of the time it would be more along the lines of
14 an open question, particularly if the conversation is flowing.

15 Q [MR. MURPHY]: All right. At any time did anyone ever yell at
16 Mr. Hamdan or act in any manner that you would consider to be
17 threatening?

18 A [MR. [REDACTED]]: No, sir. Not during my interview.

19 Q [MR. MURPHY]: Did Mr. Hamdan ever tell you or anyone else,
20 that you're aware of, that he was abused, mistreated, or tortured by
21 anyone at any time?

22 A [MR. [REDACTED]]: At the time of my interview in May of 2003,
23 no. Now, subsequent to that, and particularly recently, I've read

1 some things in open press and have heard from being down here. But
2 during that time, not at all.

3 Q [MR. MURPHY]: Okay. What would you have done if during the
4 interviews you had received information from Mr. Hamdan, or anyone
5 else for that matter, that he was being abused?

6 A [MR. ██████████]: If that came up during that interview or any
7 other interview, according to my instruction and our policy, I would
8 take details of the allegation, and then report it up the chain of
9 command.

10 Q [MR. MURPHY]: Did that become necessary while you were
11 interviewing Salim Hamdan?

12 A [MR. ██████████]: No, sir.

13 Q [MR. MURPHY]: Did you have an opportunity to at least see
14 even some part of the detention facility and some part of the guards
15 working at that facility?

16 A [MR. ██████████]: The only part I saw of that facility of Camp
17 Delta was the interview facility itself. And the demeanor of the
18 guards as they would bring Salim and other interviewees into the
19 facility with the restraints, and then placing the person in there.
20 But outside of the interview room, I had not seen any part of the
21 facility.

1 Q [MR. MURPHY]: From that part you did see, did you ever see
2 the guards act abusively at all to Mr. Hamdan or any other detainee?

3 A [MR. ██████████]: To Mr. Salim, not at all. And the same with
4 all the other detainees. If anything, I would say, in all my trips
5 to Guantanamo I've been impressed with the professionalism of the
6 guards in the small snapshot, if you will, that I see of the transit
7 of the detainees.

8 Q [MR. MURPHY]: Did Mr. Hamdan ever tell you he was forced at
9 any time to speak against his will, or that he made up false
10 information for any reason?

11 A [MR. ██████████]: No.

12 Q [MR. MURPHY]: Did you provide him with an opportunity to eat
13 and drink?

14 A [MR. ██████████]: Yes, sir.

15 Q [MR. MURPHY]: Did he indicate a willingness to talk to you?

16 A [MR. ██████████]: Yes.

17 Q [MR. MURPHY]: And how would you--how did he express that
18 willingness?

19 A [MR. ██████████]: Well, as I conduct my interviews, and with
20 Salim, after greetings and checking on health, welfare, I always ask:
21 Are you okay physically to talk? Do you agree to talk? And I do not
22 recall any indication that Salim was either unwilling or disinclined
23 to talk that day.

1 Q [MR. MURPHY]: Did you provide him with any rights
2 advisements, such as Article 31 warnings under the UCMJ or
3 Miranda-type warnings?

4 A [MR. [REDACTED]]: No, sir.

5 Q [MR. MURPHY]: And why was that?

6 A [MR. [REDACTED]]: Well, at the time, according to policy, there
7 was no provision for rights warning as established up the chain of
8 command.

9 Q [MR. MURPHY]: Was it clear to you as an investigator that Mr.
10 Hamdan was free to choose to speak with you or not speak with you?

11 A [MR. [REDACTED]]: Yes, sir.

12 Q [MR. MURPHY]: And how was that made clear to you?

13 A [MR. [REDACTED]]: Well, again, if an interviewee, Salim or any
14 other interviewee, said that he was unwilling or did not speak at
15 all, I would just break off the interview and try to establish first
16 why that might be that one was not willing to talk that day. But,
17 again, it's up to him. If he doesn't want to talk, then I terminate
18 the interview.

19 Q [MR. MURPHY]: Was it important to you as a federal agent that
20 the information you received was both reliable and accurate?

21 A [MR. [REDACTED]]: Yes, sir.

22

23

1 Q [MR. MURPHY]: And why was that?

2 A [MR. [REDACTED]]: Well, at this time in this era, when
3 conducting the interviews, first, if there's information or potential
4 information of intelligence value, it's important that that be
5 accurate through the vetting or validation process. And then, as far
6 as the law enforcement, when it comes to the elements of the crime,
7 of course that's important for accuracy of the information. So,
8 again, this information would have to be checked and vetted against
9 other known suspected bits of information.

10 Q [MR. MURPHY]: Did you have reports prepared that summarized
11 your interviews with Salim Hamdan, either FBI 302s or CITF form 40s?

12 A [MR. [REDACTED]]: Yes. In this case, it was the CITF form 40.

13 Q [MR. MURPHY]: And is that a summary of the interview results?

14 A [MR. [REDACTED]]: Yes.

15 Q [MR. MURPHY]: Did you have a chance to review that in
16 preparation for your testimony today?

17 A [MR. [REDACTED]]: Yes.

18 [END OF PAGE]

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1 Q [MR. MURPHY]: I'm going to go through a complete series of
2 allegations that have been raised. And after I go through the
3 complete list, I'm going to ask you if you have any information about
4 any of these:

5 Allegations that personal property was taken away from Mr.
6 Hamdan in order to facilitate the interviews. Allegations that
7 medical care was either provided or not provided depending upon the
8 success or failure of the interviews. Allegations that a guard was
9 abusive to Mr. Hamdan, be it male or female, with the specific
10 allegation that a guard touched him in the groin area. Allegations
11 that he was placed in solitary confinement specifically to facilitate
12 the interview process. Allegations that a soldier in Bagram placed a
13 knee in the back of Mr. Hamdan's back. Allegations in Kandahar that
14 he was threatened to be killed, and also in Kandahar that a gun was
15 placed in front of him in a threatening manner.

16 Do you have any information about any of those allegations?

17 A [MR. ██████████]: No, sir. Up to that time? Up to or during
18 the interview?

19 Q [MR. MURPHY]: Right.

20 A [MR. ██████████]: Negative. Salim had mentioned that--I do
21 recall vaguely, though, something about his personal effects and
22 maybe some misunderstanding about where they were moved. But beyond

1 that, nothing. I heard nothing of anything that you mentioned in
2 that list.

3 Q [MR. MURPHY]: All right. And did you know of any interview
4 or--yourself or anyone you worked with, who was directing that
5 personal property be moved or not moved to facilitate the interview
6 process?

7 A [MR. ██████████]: No. In fact, if I had been aware of that, I
8 would have investigated and asked that it be stopped, because it
9 certainly wouldn't help my interview.

10 Q [MR. MURPHY]: All right. Let me run through a couple of
11 other allegations. I will go through the complete list, and then ask
12 you at the end if you know anything about them.

13 Allegations that Mr. Hamdan saw an Afghani local force
14 member shoot an Arab, and that because of that he felt threatened by
15 U.S. forces or special agents. Allegations that Mr. Hamdan claims
16 that he made up false information for federal agents about
17 transporting weapons. Allegations that because a hood was placed
18 over Mr. Hamdan's head, he felt that he would be killed. Allegations
19 that Mr. Hamdan saw a detainee beaten to death at Bagram, and that as
20 a result Mr. Hamdan believed that his survival depended on
21 cooperating with U.S. officials. And, finally, allegations that Mr.
22 Hamdan saw detainees beaten and lying on a tarmac somewhere, in

1 extreme cold weather, and that this caused Mr. Hamdan to believe that
2 he was at the mercy of U.S. agents.

3 Do you have any information on any of that?

4 A [MR. ██████████]: Up to and through the time of my interview
5 with Salim, I had never heard any of that before.

6 Q [MR. MURPHY]: Okay. And when you say up to, you've heard
7 these during the course of this litigation, that these allegations
8 that are out there. Is that right?

9 A [MR. ██████████]: Yes. In fact, just very recently.

10 Q [MR. MURPHY]: All right. You have no information that
11 supports the truth of any of these allegations?

12 A [MR. ██████████]: That's correct. I have no information that
13 would support that.

14 Q [MR. MURPHY]: All right. Can you briefly provide us a
15 summary about the key admissions that Mr. Hamdan made to you during
16 your interview with him?

17 A [MR. ██████████]: Yes. Salim described how sometime during
18 1996 he was headed to the jihad front of Tajikistan. But when he
19 arrived in Afghanistan to head to Tajikistan, that jihad front had
20 been closed, at which time, he met Osama bin Laden. And after
21 discussions with Osama bin Laden about his background and his
22 upbringing, he was offered the opportunity to at first work on farms
23 owned by bin Laden and part of al Qaeda. Then after going a period

1 of, as he described, evaluation by Saif Al-Adel Al-Masri, who is one
2 of the highest ranking al Qaeda members and in charge of Osama bin
3 Laden's personal security detail, he was offered the chance to be
4 Osama bin Laden's personal--one of his personal drivers as well as
5 his in-close bodyguard detail.

6 He also described some of the methodology of the bodyguard
7 detail, such as the changing out of vehicles, the placement of bin
8 Laden and others, the weapons used, some of that training. And he
9 also described how, again, under Saif Al-Adel's direction, usually
10 transporting weapons from Taliban warehouses to al Qaeda warehouses,
11 and reporting back to Saif Al-Adel.

12 And then, at the time of 9/11 how, prior to the attack,
13 Salim was part of moving the Sheikh, Osama bin Laden, to various
14 places up to the time of the attack. And then on 9/11 itself, he was
15 separated from Osama, and then upon hearing of the attack returned to
16 Osama's location again as part of the security.

17 Q [MR. MURPHY]: All right.

18 A [MR. [REDACTED]]: Also, to--one additional and important thing
19 Salim described is pledging a sacred oath of allegiance to Osama bin
20 Laden and the cause.

21 Q [MR. MURPHY]: And what is that referred to as?

22 A [MR. [REDACTED]]: In Arabic, it's "bayat."

1 Q [MR. MURPHY]: All right. And that's a summary of your
2 interview. At trial, in response to my more detailed questions,
3 could you provide an even greater detail?

4 A [MR. [REDACTED]]: Yes, sir.

5 Q [MR. MURPHY]: All right. In order to corroborate some of the
6 admissions, did you as part of your investigation have an opportunity
7 to see two videos, one referred to as the Al-Fitr video, and the
8 other is the CNN video?

9 A [MR. [REDACTED]]: Yes, sir.

10 CTC [MR. MURPHY]: We have two stills, Your Honor, not the
11 entire video, just two stills that have previously been shown in the
12 jurisdictional hearing. And with permission of the Court, I'd like
13 to mark them as the next two appellate exhibits in order to show them
14 to the Court and ask them to be published. The next two appellate
15 exhibits I believe would be 265 and 266.

16 MJ [CAPT ALLRED]: You have a smoke flare coming up here from
17 your government table.

18 CTC [MR. MURPHY]: Okay.

19 I've been told the first one has already been marked as
20 252.

21 MJ [CAPT ALLRED]: Weren't they marked several months ago with a
22 number closer to 40?

1 CDC [MR. SCHNEIDER]: They were marked December 6, 2007, Your
2 Honor.

3 MJ [CAPT ALLRED]: What's the number? Both of these have
4 already been admitted into evidence. Am I wrong?

5 CTC [MR. MURPHY]: I have to tell you, I don't know the
6 appellate number.

7 MJ [CAPT ALLRED]: Okay. Well, I suppose we can mark them
8 again. What are the numbers, LN1, for the next two appellate in
9 order? 265, 266? Okay.

10 **[APPELLATE EXHIBITS NO. 265 AND 266.]**

11 CTC [MR. MURPHY]: All right. If we could first show it first
12 only to the military judge.

13 MJ [CAPT ALLRED]: Didn't we show this yesterday and already
14 mark it with a number yesterday?

15 TC [LCDR STONE]: Yes, sir.

16 MJ [CAPT ALLRED]: Do you remember the number from yesterday?

17 TC [LCDR STONE]: 252.

18 MJ [CAPT ALLRED]: This is number 252.

19 CTC [MR. MURPHY]: That's what they were signaling us. It's
20 already been marked as 252.

21 MJ [CAPT ALLRED]: Okay. This has already been marked maybe
22 twice before now.

1 CTC [MR. MURPHY]: All right and the second one. Your Honor, I
2 would offer them both into evidence for this motion, and ask that
3 they be shown to the witness and to all others.

4 MJ [CAPT ALLRED]: Very well.

5 Q [MR. MURPHY]: All right. Can you go back first what was just
6 now marked as Exhibit 265?

7 A [MR. [REDACTED]]: Okay.

8 MJ [CAPT ALLRED]: The first one is 252. This was marked
9 yesterday.

10 CTC [MR. MURPHY]: I'm sorry. 252.

11 Q [MR. MURPHY]: Do you recognize this appellate exhibit?

12 A [MR. [REDACTED]]: Should--do I hit the screen? Okay.

13 Q [MR. MURPHY]: Do you recognize that?

14 A [MR. [REDACTED]]: Yes, sir.

15 Q [MR. MURPHY]: And do you recognize the people in there?

16 A [MR. [REDACTED]]: Two of the people. Yes.

17 Q [MR. MURPHY]: Okay. Who are they?

18 A [MR. [REDACTED]]: That's to the left is Osama bin Laden, and on
19 the right is Salim Ahmed Salim Hamdan.

20 Q [MR. MURPHY]: Does that help corroborate part of the
21 admissions that you received from Mr. Hamdan?

22 A [MR. [REDACTED]]: Yes, sir.

1 Q [MR. MURPHY]: All right. Let's go to the next exhibit, 266.
2 Do you recognize this image?
3 A [MR. [REDACTED]]: Yes.
4 Q [MR. MURPHY]: And can you identify certain people in this
5 image?
6 A [MR. [REDACTED]]: Yes, I can.
7 Q [MR. MURPHY]: And would you do so.
8 A [MR. [REDACTED]]: This is a still from what's referred to as
9 the Eid Al-Fitr video. And to the left, almost the farthest left is
10 Salim Ahmed there with the--you can see the long gun and the
11 partially exposed jambiya, which is the dagger that males from Yemen
12 wear. And then----
13 MJ [CAPT ALLRED]: I'm sorry, who is that person?
14 A [MR. [REDACTED]]: That's Salim Ahmed Hamdan.
15 MJ [CAPT ALLRED]: Okay.
16 Q [MR. MURPHY]: On the far left?
17 A [MR. [REDACTED]]: On the far left, with the ghutra or shamaq on
18 his left, appears to be like a white and black check, that's Salim
19 Hamdan.
20 Q [MR. MURPHY]: All right. Did you indicate that you saw a
21 firearm there?
22 A [MR. [REDACTED]]: Yes, sir. On the right shoulder there's a
23 long gun of some sort.

1 Q [MR. MURPHY]: All right. Do you recognize anyone else in the
2 picture?

3 A [MR. [REDACTED]]: Yes. Moving to the right of the photograph,
4 the second individual from the right is Nasser Ahmed Al-Bahri, also a
5 bodyguard, an inner circle or close-in body guard of Osama bin Laden.
6 And then, of course, Osama bin Laden himself.

7 Moving to the left next to Nasser Akhmed Al-Bahri with the
8 white shamaq over his head and the brown garment over his thawb, in
9 his left hand there's also a long gun of some kind.

10 MJ [CAPT ALLRED]: Is there some mechanism we can use where the
11 witness can make a mark on this screen and indicate?

12 CTC [MR. MURPHY]: Yes. I think, why don't we just go through
13 again, and perhaps circle on screen. And give us the names of each
14 of the people.

15 MJ [CAPT ALLRED]: Can he just use his fingertip?

16 CTC [MR. MURPHY]: I think it will work that way, Your Honor.

17 MJ [CAPT ALLRED]: Now we're talking.

18 Q [MR. MURPHY]: Give us the names again.

19 A [MR. [REDACTED]]: That's Salim Ahmed Salim Hamdan. Nasser
20 Ahmed Nasser Al-Bahri. And Osama bin Laden.

21 [END OF PAGE]

22

23

1 Q [MR. MURPHY]: All right.

2 CTC [MR. MURPHY]: The government would offer this as a sub-
3 exhibit, give it an alpha after its name, and ask that that be
4 captured and be made a part of the record.

5 MJ [CAPT ALLRED]: All right.

6 Q [MR. MURPHY]: All right. Just a couple other questions,
7 Special Agent [REDACTED], on your interview process. And before I turn
8 to that, did this picture, the still from the Al-Fitr video, also
9 provides some independent corroboration of the admissions you
10 received from Mr. Hamdan?

11 A [MR. [REDACTED]]: Yes, sir.

12 Q [MR. MURPHY]: All right. Could you describe for us your
13 understanding of the letters BSCT? Are you familiar with that?

14 A [MR. [REDACTED]]: Yes, sir.

15 Q [MR. MURPHY]: What does that stand for?

16 A [MR. [REDACTED]]: Behavioral Science Consultation Team.

17 Q [MR. MURPHY]: Were they a part of your interview process at
18 all?

19 A [MR. [REDACTED]]: For Mr. Hamdan and the two other al Qaeda
20 members in May of 2003, yes. But----

21 Q [MR. MURPHY]: Could you describe how?

22 A [MR. [REDACTED]]: But I must make clear, though, this is--the
23 term Behavioral Science Consultation Team is applied to an initiative

1 from the Criminal Investigation Task Force, not here at the Joint
2 Task Force of Guantanamo.

3 Q [MR. MURPHY]: All right.

4 A [MR. [REDACTED]]: And the Behavioral Science Consultation Team,
5 BSCT for short, out of the CITF, was designed primarily for training
6 in a crash-course fashion, the newly initiated for dealing with
7 persons from the Near and Middle East culture, language, history, and
8 interview and interrogation.

9 Now, for this particular tasking that came for myself and
10 [REDACTED] from the Office of Military Commissions and CITF
11 leadership, neither one of us were assigned to the CITF, was to go to
12 Guantanamo for these interviews, because the commission's process was
13 entering the next phase. So the three individuals, including Salim,
14 were quite important and important within al Qaeda's structure for
15 the interviews.

16 So in addition to myself and [REDACTED], there were two
17 prosecutors from the Office of Military Commission and a psychologist
18 from the BFCT--from the BSCT, from the CITF, and I believe an analyst
19 or two, and would conduct some observations in the observation room
20 in Camp Delta, and then provide any kind of input or advice when
21 conducting getting the best results of the interview.

1 Q [MR. MURPHY]: All right. So is it fair to say their role was
2 to be a resource to you to consult? Is that right?

3 A [MR. [REDACTED]]: That's very accurate. Yes, sir.

4 Q [MR. MURPHY]: And as far as their involvement in the actual
5 interview, it was that of an observer. Is that right?

6 A [MR. [REDACTED]]: That's correct.

7 Q [MR. MURPHY]: They weren't doing anything to Mr. Hamdan in
8 his conditions of confinement or anything to facilitate the interview
9 in any way?

10 A [MR. [REDACTED]]: No. This--the BSCT from CITF had no access
11 to or involvement or even direct viewing of the person. And in fact,
12 from what I remember in May of 2003, there was important but minimal,
13 really, observation. In fact, they, if I recall, headed back to
14 Washington before we even concluded that series of interviews.

15 Q [MR. MURPHY]: All right. The final topic I have is on your
16 notes. You're aware that we handed over some rough notes to the
17 defense the other day recently. Right?

18 A [MR. [REDACTED]]: Yes, sir.

19 Q [MR. MURPHY]: You're aware of our diligent search to try and
20 get these notes. Is that correct?

21 A [MR. [REDACTED]]: Yes, I am.

1 Q [MR. MURPHY]: Could you just explain the situation of the
2 rough notes and how we eventually got them to the defense?

3 A [MR. [REDACTED]]: Yeah. Again, I'm not--and I have never been
4 assigned to the Criminal Investigation Task Force, so until really
5 this weekend I was not aware that the notes were not a part of the
6 case file. So upon hearing about that, tried to, if you will, walk
7 things backwards to find out where the notes might be. So some of
8 the special agents assigned to the CITF who are here now had been
9 making inquiries, double, triple checks back at Fort Belvoir through
10 the weekend. And so on Monday I myself started calling back to my
11 headquarters and my previously--my previous assignment with the
12 counterintelligence field activity for some folks who work for me to
13 ask them to check my files and holdings. And it was just yesterday
14 morning that one of my former subordinates, on the phone I walked him
15 through checking some files that were actually packed up for
16 registered mail to NCIS headquarters. And he went through page by
17 page, and then when he hit on something that had dates of May 2003, I
18 had him fax and then scan those documents down here to Guantanamo.

19 Q [MR. MURPHY]: And what we're talking about is not the reports
20 that were provided; we're talking about the rough notes?

21 A [MR. [REDACTED]]: That's correct.

22 CTC [MR. MURPHY]: All right. If I may just have a moment, Your
23 Honor.

1 Ramadan was somewhere around the 5th of January. So that would have
2 been on or about 5 or 6 January 2000.

3 Q [MR. SCHNEIDER]: So eight and a half years ago?

4 A [MR. ██████████]: Eight and a half years ago.

5 Q [MR. SCHNEIDER]: The other photo, what year?

6 A [MR. ██████████]: I'm sorry?

7 Q [MR. SCHNEIDER]: What year for the other photo?

8 A [MR. ██████████]: The other photo, I'm not sure if that was
9 approximately 1998, 1999 time frame. Somewhere around there.

10 Q [MR. SCHNEIDER]: Nine, ten years ago. Are you aware of any
11 evidence that on the day those two photos were taken, that the people
12 depicted in the photos were using firearms that day against
13 Americans?

14 A [MR. ██████████]: No evidence.

15 Q [MR. SCHNEIDER]: How old would you guess that child is?

16 A [MR. ██████████]: I would think that lad is around two, two and
17 a half.

18 Q [MR. SCHNEIDER]: I take it that photo doesn't depict him
19 engaging in any criminal conduct, as far as we can tell?

20 A [MR. ██████████]: As far as we can tell. But I'm not sure what
21 the statutes call for as far as alignment with that organization at
22 that time.

1 Q [MR. SCHNEIDER]: Theoretically, he could be prosecuted for
2 something like this?

3 A [MR. [REDACTED]]: Correct.

4 Q [MR. SCHNEIDER]: The notes, that's some 49 pages. Right?

5 A [MR. [REDACTED]]: As faxed yesterday.

6 Q [MR. SCHNEIDER]: And as I understand it, you were not aware
7 of those back in December when you testified?

8 A [MR. [REDACTED]]: I was not. It didn't come up as an issue; so
9 my presumption was it was with the case file.

10 Q [MR. SCHNEIDER]: But you were aware that you had taken
11 handwritten notes during your interview?

12 A [MR. [REDACTED]]: Yes.

13 Q [MR. SCHNEIDER]: You just didn't have them?

14 A [MR. [REDACTED]]: I didn't have them. I had the EFD or the
15 form 40.

16 Q [MR. SCHNEIDER]: The typewritten summary?

17 A [MR. [REDACTED]]: Yes, sir.

18 Q [MR. SCHNEIDER]: You had made some efforts to retrieve any
19 handwritten notes back in December. You just weren't successful. Is
20 that what happened?

21 A [MR. [REDACTED]]: I can't recall if it even came up as an issue
22 about the notes either being asked for them or--I didn't have a need
23 for them, myself.

1 Q [MR. SCHNEIDER]: So it may have been that you didn't even
2 look for them, not that you couldn't find them?

3 A [MR. [REDACTED]]: Correct.

4 Q [MR. SCHNEIDER]: Okay. And is it--and I don't mean to be
5 lighthearted about this. But is it just a coincidence that you went
6 looking for them in the last few business days and they showed up?
7 Or does it have any relationship to imminent trial? Let me ask it a
8 different way. I'll object, sustain, and re-ask the question.

9 MJ [CAPT ALLRED]: I appreciate that.

10 Q [MR. SCHNEIDER]: Now, isn't it true that the stepped-up
11 efforts to find these 49 pages of handwritten notes contemporaneously
12 taken by you during the time you were talking to Mr. Hamdan in May of
13 2003 was because you knew the trial was coming soon?

14 A [MR. [REDACTED]]: Not completely, no. I mean, it was a
15 good-faith effort on my part once I heard there was discussion of
16 where are the notes and some other items that should have been
17 contained in the case file. So I tried to pitch in as best I could.

18 Q [MR. SCHNEIDER]: Step up the efforts?

19 A [MR. [REDACTED]]: Yes, sir.

20 Q [MR. SCHNEIDER]: Okay. A couple of questions about the
21 notes. You've looked at them recently. Right? Yesterday?

22 A [MR. [REDACTED]]: Yesterday.

23

1 Q [MR. SCHNEIDER]: Today?

2 A [MR. [REDACTED]]: Not today.

3 Q [MR. SCHNEIDER]: Some handwritten?

4 A [MR. [REDACTED]]: Yes.

5 Q [MR. SCHNEIDER]: Some typewritten?

6 A [MR. [REDACTED]]: Yes. Well. Yes, that's correct. It was
7 previously client-attorney-client work. But yes, sir.

8 Q [MR. SCHNEIDER]: The handwriting is yours?

9 A [MR. [REDACTED]]: On some of it, some of the pages, but not
10 all.

11 Q [MR. SCHNEIDER]: Who else has handwriting there?

12 A [MR. [REDACTED]]: I believe it's [REDACTED] handwriting as
13 well.

14 Q [MR. SCHNEIDER]: Isn't it true that Mr. [REDACTED] takes his
15 notes in Arabic when speaking with an Arabic-speaking interviewee?

16 A [MR. [REDACTED]]: Primarily in Arabic.

17 Q [MR. SCHNEIDER]: The English notes are primarily yours?

18 A [MR. [REDACTED]]: Yes, sir.

19 Q [MR. SCHNEIDER]: What about those typewritten notes? You
20 didn't type that up. Did you?

21 A [MR. [REDACTED]]: No.

1 Q [MR. SCHNEIDER]: So, for instance, the question, "Do we have
2 a coercion problem here," those weren't yours? Those are
3 typewritten.

4 A [MR. [REDACTED]]: Typewritten, from the best--I mean, it's safe
5 to presume that came from the prosecutors, from the Office of
6 Military Commission.

7 Q [MR. SCHNEIDER]: Okay. So your assignment in May of 2003 was
8 from the Office of Military Commissions, which was engaged in
9 building a case. Correct?

10 A [MR. [REDACTED]]: Correct. And the leadership of the CITF.

11 Q [MR. SCHNEIDER]: And your job in part was to come down here
12 and assist in building that case?

13 A [MR. [REDACTED]]: Correct.

14 Q [MR. SCHNEIDER]: And that case was a criminal case?

15 A [MR. [REDACTED]]: Correct.

16 Q [MR. SCHNEIDER]: Correct?

17 A [MR. [REDACTED]]: Yes, sir.

18 Q [MR. SCHNEIDER]: And that was a case that's being developed
19 as the result of an ongoing criminal investigation. Correct?

20 A [MR. [REDACTED]]: Correct.

21 [END OF PAGE]

1 Q [MR. SCHNEIDER]: And Mr. Hamdan was a suspect in that ongoing
2 criminal investigation before you ever met him. Wasn't he? As far
3 as you know.

4 A [MR. [REDACTED]]: Can you--I'm not quite sure I understand the
5 question.

6 Q [MR. SCHNEIDER]: Shall I rephrase the question? Perhaps.
7 Mr. Hamdan was a suspect in that ongoing criminal investigation even
8 before you met him. Wasn't he?

9 A [MR. [REDACTED]]: As far as I know, of course. Yes.

10 Q [MR. SCHNEIDER]: That was your understanding as you got on
11 the plane to fly down here?

12 A [MR. [REDACTED]]: That's right. Yes, sir.

13 Q [MR. SCHNEIDER]: The typewritten information among your 49
14 pages of notes was from someone other than yourself, as you
15 indicated, and also someone other than Mr. [REDACTED]. Correct?

16 A [MR. [REDACTED]]: Correct.

17 Q [MR. SCHNEIDER]: Agent [REDACTED]. Also, from someone other than
18 any other investigation. It wasn't the FBI who gave you that.
19 Correct?

20 A [MR. [REDACTED]]: I believe that's correct. There's also a
21 possibility it could have come from an analyst working the case at
22 CITF or detailed to OMC. But beyond that, I looked at it yesterday

1 and it would be speculation on my part as to exactly who typed that
2 up.

3 Q [MR. SCHNEIDER]: Could it have come from prosecutors?

4 A [MR. [REDACTED]]: It could have come from prosecutors. Sure.

5 Q [MR. SCHNEIDER]: Prosecutors who were in attendance on the
6 island observing your questioning of Mr. Hamdan?

7 A [MR. [REDACTED]]: I'm speculating, yes.

8 Q [MR. SCHNEIDER]: Well, I don't mean for you to guess out of
9 the blue, but you were there, I wasn't. That's not just possible;
10 it's likely. Isn't it?

11 A [MR. [REDACTED]]: I would say it's possible.

12 Q [MR. SCHNEIDER]: All of your notes were in English, and all
13 of your conversations when you spoke with Mr. Hamdan were in Arabic?

14 A [MR. [REDACTED]]: Were in Arabic. That's correct.

15 Q [MR. SCHNEIDER]: Do you believe you spoke Arabic to Mr.
16 Hamdan but wrote your notes in English?

17 A [MR. [REDACTED]]: Yes.

18 Q [MR. SCHNEIDER]: Is it your understanding that Mr. Hamdan was
19 rendered to the Americans some five or six days after he was captured
20 by the Afghan troops?

21 A [MR. [REDACTED]]: I really didn't know the details of how he
22 came into U.S. custody.

23

1 Q [MR. SCHNEIDER]: Does that sound familiar, generally?

2 A [MR. [REDACTED]]: Generally, yes.

3 Q [MR. SCHNEIDER]: And what can you tell us? What light can

4 you shed about the circumstances of his detention and confinement and

5 interrogation during those five or six days before he was rendered to

6 the Americans?

7 A [MR. [REDACTED]]: I have no--nothing to shed, other than

8 viewing the detention video. I think we referred to it in the

9 jurisdiction hearing. That was the only insight I had into that

10 time.

11 Q [MR. SCHNEIDER]: A yes or no question: Do you know who

12 videotaped these interrogations?

13 A [MR. [REDACTED]]: Only in a general sense.

14 Q [MR. SCHNEIDER]: I don't believe----

15 MJ [CAPT ALLRED]: Well.

16 Q [MR. SCHNEIDER]: The next question will be, please pause

17 before you answer, a new question, if you know.

18 CTC [MR. MURPHY]: Your Honor, I think the first question should

19 be, do you know who questioned him? And if then--I'm not so sure

20 that then we would need probably----

21 MJ [CAPT ALLRED]: Well, I think the only acceptable answer here

22 is U.S. forces.

23 CTC [MR. MURPHY]: Correct.

1 MJ [CAPT ALLRED]: If in fact they were U.S. personnel. So, if
2 you know who questioned him and they were U.S. personnel, then your
3 answer should be that they were U.S. personnel.

4 WIT [MR. [REDACTED]]: Yes, sir. I was advised they were U.S.
5 personnel doing the questioning of Salim at that time.

6 Q [MR. SCHNEIDER]: Pause before you answer again, please. Do
7 you know if they were U.S. military?

8 MJ [CAPT ALLRED]: I don't think I'll allow the answer to that
9 question.

10 CTC [MR. MURPHY]: I think that's objectionable.

11 MJ [CAPT ALLRED]: Let's not ask that question.

12 Q [MR. SCHNEIDER]: In your typewritten summary, you indicate
13 something about uncontrollable enthusiasm. Do you remember that?

14 A [MR. [REDACTED]]: Yes, sir.

15 Q [MR. SCHNEIDER]: What exactly, if you recall, were his words?
16 What were his words?

17 A [MR. [REDACTED]]: That--the uncontrollable enthusiasm as
18 regards to his feeling of Osama bin Laden?

19 Q [MR. SCHNEIDER]: I mean, he didn't suddenly start speaking
20 English. Did he?

21 A [MR. [REDACTED]]: No.

22

23

1 Q [MR. SCHNEIDER]: What were his words?

2 A [MR. ██████████]: Hamas Ziyadin. Hamas means zeal or
3 enthusiasm in Arabic. Ziyadin is the adjective meaning very or
4 uncontrolled.

5 Q [MR. SCHNEIDER]: And your handwritten notes, am I correct
6 that they were taken contemporaneous with your interrogation and his
7 answers?

8 A [MR. ██████████]: Yeah. Primarily, the notes of the interview
9 with Salim were taken by ██████████.

10 Q [MR. SCHNEIDER]: The English handwritten notes were ██████████
11 ██████████'s?

12 A [MR. ██████████]: The English, as provided yesterday, from my
13 review--that appears to be our first draft taken, compiled
14 immediately after the interview. Because one of the--which was quite
15 different in this set of interviews because of the timeline entering
16 the next phase for Office of Military Commissions was we were to do
17 the summary immediately following the interview. In other times
18 where there's less of, say, a time constraint, it's done at first
19 opportunity. So I know that--I recall in the BOQ here myself and Mr.
20 ██████████ with me at the laptop computer doing the summary of the
21 interview immediately after.

22 So there would have been notes, the contemporaneous notes
23 both from me and from ██████████ that that was put together with, in

1 our discussion of the interview. I don't know where they are or if
2 they still exist.

3 CDC [MR. SCHNEIDER]: May I have the last question read back,
4 please?

5 MJ [CAPT ALLRED]: LN1, can you read back the last question from
6 your transcript there.

7 The last question you posed to the witness?

8 CDC [MR. SCHNEIDER]: Yes, please.

9 **[Court reporter looked for the last question asked.]**

10 CDC [MR. SCHNEIDER]: Let me try it again if I may. Thank you.

11 Q [MR. SCHNEIDER]: You read the notes yesterday?

12 A [MR. [REDACTED]]: Yes.

13 Q [MR. SCHNEIDER]: The English notes, your handwriting in large
14 part?

15 A [MR. [REDACTED]]: No. I believe in largest part it's [REDACTED]'s.

16 Q [MR. SCHNEIDER]: Did he take any notes in Arabic?

17 A [MR. [REDACTED]]: I believe he did. Yes.

18 Q [MR. SCHNEIDER]: Was he taking one set of notes in Arabic and
19 a separate set of notes that ended up in your file in English?

20 A [MR. [REDACTED]]: No. I believe what you're referring to are
21 the notes. Again, in my best estimation that's a draft of the
22 summary that was then used to do the typewritten form 40.

1 Q [MR. SCHNEIDER]: Certainly, those were taken much more
2 closely--more closely to hearing the conversation than the
3 typewritten summary. Weren't they?

4 A [MR. [REDACTED]]: Repeat?

5 Q [MR. SCHNEIDER]: Were the handwritten notes created more
6 closely in time to the interrogation than the typewritten summary?

7 A [MR. [REDACTED]]: Yes. In this case, by a few hours.

8 Q [MR. SCHNEIDER]: Mr. Hamdan was reclining on the floor?

9 A [MR. [REDACTED]]: At times, yes, sir. As were we.

10 Q [MR. SCHNEIDER]: I'm paying attention to the stop light, so;
11 bear with me.

12 A [MR. [REDACTED]]: I should have one too, sorry, I suppose.
13 Sorry.

14 Q [MR. SCHNEIDER]: I'm hopeful, it's your pace rather than
15 mine.

16 A [MR. [REDACTED]]: I just hope I'm doing better than last time.

17 Q [MR. SCHNEIDER]: Agent [REDACTED], did he appear tired?

18 A [MR. [REDACTED]]: Did Salim appear tired at the time? Not
19 notably so. No, I can't recall--I mean, again, as is my custom,
20 ample time was spent on how the detainee, how the interviewee is
21 feeling, nothing of any complaints surfaced.

22

23

1 Q [MR. SCHNEIDER]: So it never occurred to you that he may have
2 been reclining on the floor because of his back?

3 A [MR. [REDACTED]]: Absolutely not.

4 Q [MR. SCHNEIDER]: Absolutely.

5 In your job at the time, were there certain routines,
6 procedures, standard policies that you followed, generally speaking?

7 A [MR. [REDACTED]]: Generally speaking, yes, sir.

8 Q [MR. SCHNEIDER]: Did those apply to how interrogations should
9 be conducted?

10 A [MR. [REDACTED]]: Generally.

11 Q [MR. SCHNEIDER]: Generally? Was one of those standard
12 procedures that you would make an informed decision whether to give
13 the person being interrogated an advisement of rights?

14 A [MR. [REDACTED]]: That would be. But not in this context.

15 Q [MR. SCHNEIDER]: I understand that completely. But, in
16 general. Let's take interviews other than at Guantanamo Bay.

17 A [MR. [REDACTED]]: Yes, sir.

18 Q [MR. SCHNEIDER]: Your practice is to give rights?

19 A [MR. [REDACTED]]: Right. For example, a recent interview I
20 conducted in Yemen was with a rights advisement. But it wasn't in
21 this context, though.

22 Q [MR. SCHNEIDER]: How far away is Yemen?

23 A [MR. [REDACTED]]: By time? Plane? Distance?

1 Q [MR. SCHNEIDER]: Time, miles, how the crow flies.

2 A [MR. [REDACTED]]: It's usually the better part of two days by
3 flying.

4 Q [MR. SCHNEIDER]: Generally speaking, is it your practice to
5 advise someone who is a suspect in an ongoing criminal investigation
6 of his right to remain silent and not make self-incriminating
7 statements?

8 A [MR. [REDACTED]]: Yes, sir. Outside, again, of the Guantanamo
9 context.

10 Q [MR. SCHNEIDER]: Outside of Guantanamo. Even in Yemen?

11 A [MR. [REDACTED]]: Yemen. This was for an individual who was
12 under indictment in the Southern District of New York. So of course
13 it attached, as per procedure.

14 Q [MR. SCHNEIDER]: Was Nasser Al-Bahri under indictment in
15 January 2001?

16 A [MR. [REDACTED]]: I don't know him to be under indictment at
17 that time or any time.

18 Q [MR. SCHNEIDER]: Was he under indictment on September 18,
19 2001?

20 A [MR. [REDACTED]]: No, sir.

21 [END OF PAGE]

22

23

1 Q [MR. SCHNEIDER]: Yet, on each of those occasions in Yemen,
2 two days away, you gave him a rights advisement. Didn't you?

3 A [MR. [REDACTED]]: No, sir. Not for Nasser Al-Bahri, I don't
4 believe. It didn't apply. He wasn't a suspect or a subject. At the
5 time, the Yemen government allowed us access.

6 Q [MR. SCHNEIDER]: It's not true that as you sat with him on
7 September 18, he was advised of rights by the Yemeni security police?

8 A [MR. [REDACTED]]: I don't recall that. I'm not even sure if
9 they have a form of rights advisement.

10 Q [MR. SCHNEIDER]: There's no reason you would have mentioned
11 in your summary write-up if it didn't occur. Is there?

12 A [MR. [REDACTED]]: Again, I would have to refresh my memory from
13 notes. But I don't recall. And with Nasser Al-Bahri, that rights
14 advisement applied, especially in that period right after 9/11.

15 Q [MR. SCHNEIDER]: Let's go back to your standard operating
16 procedure. That's not only yours personally, but that's your
17 agency's at the time. Right?

18 A [MR. [REDACTED]]: Yes, sir.

19 [END OF PAGE]

1 Q [MR. SCHNEIDER]: If you had interrogated or interviewed Mr.
2 Hamdan other than at Guantanamo Bay Naval Station in May of 2003,
3 knowing what you knew at the time and knowing your standard operating
4 procedures with your agency, would you have given him his rights?

5 A [MR. [REDACTED]]: In this context, again, as tasked to
6 interview a known or suspected al Qaeda member in the aftermath of
7 9/11, unless my chain of command said the rights advisement attached
8 in that scenario, it would not have been applicable because, again,
9 it wasn't policy at the time.

10 Q [MR. SCHNEIDER]: Let's talk about whose policy that was. Was
11 it yours personally?

12 A [MR. [REDACTED]]: It was not mine. It was up the chain of
13 command, as we say, much above my pay grade.

14 Q [MR. SCHNEIDER]: I understand. Was it your agency's?

15 A [MR. [REDACTED]]: The agency would be under the umbrella of the
16 policy established at either nationally or DOD.

17 Q [MR. SCHNEIDER]: Let's cut right to the point. Whose policy
18 was it?

19 A [MR. [REDACTED]]: Up the chain of command.

20 Q [MR. SCHNEIDER]: How far?

21 A [MR. [REDACTED]]: I'm not--you know, I think I would be
22 exceeding my brief if I tried to establish that for the Court here.

1 Q [MR. SCHNEIDER]: Was it ever your understanding that that
2 policy was to apply anywhere else outside of Guantanamo Bay Naval
3 Station?

4 A [MR. [REDACTED]]: As far as the rights advisement did not
5 apply? Yes, sir.

6 Q [MR. SCHNEIDER]: Was it ever your understanding that it was
7 to apply to anyone other than those investigated in the course of the
8 terrorist investigation?

9 A [MR. [REDACTED]]: I'm not sure of the details, that part of the
10 detail.

11 MJ [CAPT ALLRED]: You've got me confused now.

12 CDC [MR. SCHNEIDER]: That's not good, Your Honor.

13 MJ [CAPT ALLRED]: Well, it's frequent though. No, I mean, go
14 back one question.

15 Was it ever the policy that the rights would not be given?
16 I got the impression that there were other places where they did not
17 give rights. I don't know if that's what you meant me to understand
18 or not.

19 Q [MR. SCHNEIDER]: Let's move from the question of whose policy
20 it was, which I don't think you're able to answer. When did it come
21 into effect?

22 A [MR. [REDACTED]]: As far as no rights advisement?
23

1 Q [MR. SCHNEIDER]: Right.

2 A [MR. ██████████]: Very good question. I'm not sure. I know
3 under--as I keep referring to a certain context, like, for example,
4 my recent trip to Yemen and speaking to an individual that the Yemen
5 government allowed us access to, myself and a partner, he was again
6 under indictment in the Southern District of New York. So working
7 for that task and that chain of command, it was made clear that
8 rights advisement would attach.

9 Now, in other interviews that I've conducted subsequent to
10 9/11, it just depended really on who the task came from, my chain of
11 command, and the policy and rules.

12 But I'd also like to add, though, if any person I interviewed without
13 rights advisement, right to counsel, right to silence, if he
14 indicated that he did not want to talk or would not talk, I would
15 terminate the interview.

16 Q [MR. SCHNEIDER]: To whom did the policy apply? What
17 suspects?

18 A [MR. ██████████]: I would have to say any suspects within the
19 general rubric of the war on terrorism.

20 Q [MR. SCHNEIDER]: Anyone else outside suspects in the war on
21 terrorism?

22 A [MR. ██████████]: I'm uncertain, sir.

23

1 Q [MR. SCHNEIDER]: Where did it apply?

2 A [MR. [REDACTED]]: I believe worldwide.

3 Q [MR. SCHNEIDER]: In the U.S.?

4 A [MR. [REDACTED]]: I haven't conducted any interviews in the
5 U.S. under that context, so I'm uncertain.

6 Q [MR. SCHNEIDER]: Have you ever interviewed any suspects in
7 the war on terror outside the U.S. where you gave a rights advisement
8 despite the policy?

9 A [MR. [REDACTED]]: Despite the policy or in conflict with the
10 policy?

11 Q [MR. SCHNEIDER]: Well, if the policy is to give the rights
12 advisement to everyone other than those suspects in the war on
13 terror, my question is, did you ever give it to any suspect in the
14 war on terror anywhere?

15 A [MR. [REDACTED]]: No.

16 Q [MR. SCHNEIDER]: What is an FD-395.1?

17 A [MR. [REDACTED]]: Is that--I'm guessing, because that's an FBI
18 form? Is that the EC, the electronic communication?

19 Q [MR. SCHNEIDER]: I guess it's fair to say I get to ask the
20 questions today. But----

21 A [MR. [REDACTED]]: I'm sorry. Yeah, I don't know.

22 Q [MR. SCHNEIDER]: I don't mean any disrespect.

23 A [MR. [REDACTED]]: No. I'm guessing.

1 TC [LCDR STONE]: I think if he showed him the document that he
2 has, it would probably refresh his recollection with regards to what
3 an EC 395.1 is.

4 MJ [CAPT ALLRED]: It's his examination. It depends on how bad
5 he wants the witness to answer, I guess.

6 Q [MR. SCHNEIDER]: Let me just show you. I'm going to tell you
7 what it is and then show it to you. An FBI form 302 dated
8 10/22/2001, related to investigation on October 18, 2001 in which you
9 and two other individuals interviewed Nasser Al-Bahri in Yemen. The
10 thing I'm interested in is the second paragraph where it says, quote,
11 "Al-Bahri was advised of his rights as set forth in the FD-395.1,
12 Arabic version. Al-Bahri verbally waived his rights."

13 And if you need to look at it, that's fine. But does that
14 refresh your recollection?

15 A [MR. [REDACTED]]: It does, that the special or the Arabic
16 rights advisement was on that form. But I had forgotten that we did
17 a rights advisement for Nasser Al-Bahri.

18 Q [MR. SCHNEIDER]: In Yemen?

19 A [MR. [REDACTED]]: In Yemen.

20 Q [MR. SCHNEIDER]: With regard to the war on terror?

21 A [MR. [REDACTED]]: Yeah. Provided the context was in the
22 aftermath of 9/11, chain of command was back at Washington, D.C.
23 So--and I don't mean to sound smart, either, but follow my last order

1 first. So, again, following what the chain of command had
2 established, I'm going to do what----

3 Q [MR. SCHNEIDER]: Sure. And this was within six weeks since
4 9/11.

5 A [MR. [REDACTED]]: Um-hmm.

6 Q [MR. SCHNEIDER]: Does that refresh your recollection, that
7 you did the same thing on September 18 when you were in Yemen, and
8 asked to interview the same individual?

9 A [MR. [REDACTED]]: Yeah. I don't recall the rights advisement.
10 But if it's documented there, I'm not going to argue.

11 Q [MR. SCHNEIDER]: So does that refresh your recollection at
12 all as to what happened to change not only your standard operating
13 procedure but that of your agency, between the time when you did give
14 such rights advisements to suspects in the war on terror in a foreign
15 country, and what you did with Mr. Hamdan in 2003? What happened?
16 The policy came down?

17 A [MR. [REDACTED]]: Yes, sir. Again, I would have to--it's much
18 above my level as to how that or where or when that was established.

19 Q [MR. SCHNEIDER]: When this policy that came down from on
20 high, and I mean the higher levels you don't even know, was it in
21 writing?

22 A [MR. [REDACTED]]: It may have been. But all our communications
23 primarily are over phone or e-mail, perhaps.

1 Q [MR. SCHNEIDER]: Do you have any personal knowledge, based on
2 what you experienced, saw, or heard, as to what the conditions of
3 confinement, conditions of interrogation were, or any interrogations
4 of Mr. Hamdan, other than those that you conducted?

5 A [MR. [REDACTED]]: Only what I had heard or read in open press.

6 Q [MR. SCHNEIDER]: Does the phrase Operation Sandman ring a
7 bell?

8 A [MR. [REDACTED]]: It--well, only because I've heard that term
9 within the last few days. But prior to coming down for this trip, I
10 had never heard of that before.

11 Q [MR. SCHNEIDER]: If Mr. Hamdan was subject to a program of
12 enhanced interrogation techniques known as Operation Sandman----

13 TC [LCDR STONE]: Objection. Speculation.

14 MJ [CAPT ALLRED]: I don't think I heard the end of the
15 question. Wasn't that an if?

16 TC [LCDR STONE]: Well.

17 CDC [MR. SCHNEIDER]: Yes.

18 MJ [CAPT ALLRED]: "If" he was subject to this?

19 CDC [MR. SCHNEIDER]: I'm happy to have the Court entertain
20 objections, but maybe after the question is asked instead of when.

21 MJ [CAPT ALLRED]: I like it that way, too.

22

23

1 Q [MR. SCHNEIDER]: If Mr. Hamdan was subjected to a program of
2 enhanced interrogation techniques advised by the BSCT team known as
3 Operation Sandman, wherein his sleep was systemically interrupted for
4 a period of 50 days, that wasn't your doing. Was it?

5 CTC [MR. MURPHY]: Objection.

6 A [MR. [REDACTED]]: No, sir.

7 Q [MR. SCHNEIDER]: You wouldn't condone that?

8 A [MR. [REDACTED]]: I would not condone that.

9 Q [MR. SCHNEIDER]: That's outside of what you would consider to
10 be fair or professional or responsible interrogation techniques?

11 A [MR. [REDACTED]]: Well, in fairness to, or if anything like
12 that was done, I have no details of what it was. So, you know, if it
13 was something that would not be conducive to the interview I was
14 conducting, I would object to it.

15 Q [MR. SCHNEIDER]: The presence of these two prosecutors when
16 you were down here to interview Mr. Hamdan, did they fly down with
17 you?

18 A [MR. [REDACTED]]: I believe so.

19 Q [MR. SCHNEIDER]: Did they talk to you before you got on the
20 plane to come down here?

21 A [MR. [REDACTED]]: Yes.

1 Q [MR. SCHNEIDER]: What did they say?

2 A [MR. [REDACTED]]: I can't recall the specifics, but it would
3 have been about where they were, I would presume, with the case,
4 building the case.

5 Q [MR. SCHNEIDER]: The criminal case?

6 A [MR. [REDACTED]]: Right.

7 Q [MR. SCHNEIDER]: And the psychologist that was in attendance,
8 was he on the plane--he or she.

9 A [MR. [REDACTED]]: I believe so.

10 Q [MR. SCHNEIDER]: And how about that analyst or two? Were
11 they on the plane?

12 A [MR. [REDACTED]]: Again, just guessing here, we probably came
13 down together. But airlift at that time was a little difficult, so
14 it may have been separate airlift.

15 Q [MR. SCHNEIDER]: What kind of analysts were they?

16 A [MR. [REDACTED]]: They were--would have been, again, going by
17 other series of interviews I conducted, analysts assigned to the
18 CITF.

19 Q [MR. SCHNEIDER]: Did you read the typewritten summary as well
20 as the handwritten notes in the last 24 hours of your interviews?

21 A [MR. [REDACTED]]: Parts of it. I went through everything that
22 was faxed to us yesterday, but not the summary.

1 Q [MR. SCHNEIDER]: Do you recall whether you mentioned in the
2 formal report the involvement of the two prosecutors, the
3 psychologist, and an analyst or two with respect to preparation or
4 undertaking of the interrogation?

5 A [MR. [REDACTED]]: That wasn't included in there. It wouldn't
6 have been.

7 Q [MR. SCHNEIDER]: Did they make any interview notes?

8 A [MR. [REDACTED]]: Not that I'm aware of.

9 Q [MR. SCHNEIDER]: You said that they were just observers.

10 A [MR. [REDACTED]]: Yes, sir.

11 Q [MR. SCHNEIDER]: They flew down with you, they observed, and
12 they left?

13 A [MR. [REDACTED]]: Uh-huh.

14 Q [MR. SCHNEIDER]: So you only talked to them on the plane?

15 A [MR. [REDACTED]]: Right.

16 Q [MR. SCHNEIDER]: Not down here?

17 A [MR. [REDACTED]]: After the interviews, yes.

18 Q [MR. SCHNEIDER]: You mean after the interviews were all
19 completed?

20 A [MR. [REDACTED]]: After--well.

21 Q [MR. SCHNEIDER]: Or you mean each day?

22 A [MR. [REDACTED]]: Each day. But if I recall, they left early.

23 And, you know, at the risk of insulting good colleagues and good

1 Americans, I have to say there really wasn't any significant input
2 from any of those involved for our interview.

3 Q [MR. SCHNEIDER]: Well, whether you considered it significant
4 or not, they were giving you input. Weren't they?

5 A [MR. [REDACTED]]: Yeah, some input. But I wouldn't recall
6 what, if anything, even registered with me.

7 Q [MR. SCHNEIDER]: You wouldn't recall, and you couldn't look
8 at your notes because you didn't include it in your notes. Did you?

9 A [MR. [REDACTED]]: Again, there was nothing of significance that
10 would have pertained or been included in my notes with whoever
11 accompanied us. See, at that time we were trying to--they, CITF
12 leadership, were trying to build a team concept, which I very much
13 agreed with.

14 Q [MR. SCHNEIDER]: In summary, isn't it fair to say that they
15 were doing a little more than observing? They were providing input,
16 whether you regarded it as significant or not?

17 A [MR. [REDACTED]]: That was the intention. Yes, sir.

18 Q [MR. SCHNEIDER]: Did you know what kind of input the
19 psychologists and prosecutors were giving the other interrogators
20 besides yourself?

21 A [MR. [REDACTED]]: No.

1 Q [MR. SCHNEIDER]: Do you know what kind of impact the BSCT
2 team or others were having on the conditions of confinement of those
3 interrogated, Mr. Hamdan and others?

4 A [MR. [REDACTED]]: Yeah. If I could ask here for which BSCT are
5 you referring to?

6 Q [MR. SCHNEIDER]: Tell me which ones existed.

7 A [MR. [REDACTED]]: The only one I had any involvement with or
8 exposure to was, again, the Behavioral Science Consultation Team at
9 Fort Belvoir at CITF. I understand there was some form or there was
10 a BSCT here, the Joint Task Force. But I know from one of my friends
11 and colleagues who was an original member of the Fort Belvoir CITF,
12 as he put it, they were diametrically opposed to each other as to
13 what each role, mission, impact, if you will.

14 Q [MR. SCHNEIDER]: So you are unable to shed any light on the
15 subject of sleep interruption such as Mr. Hamdan described?

16 A [MR. [REDACTED]]: That's correct.

17 Q [MR. SCHNEIDER]: Because you don't have any personal
18 knowledge?

19 A [MR. [REDACTED]]: Yes, sir.

20 Q [MR. SCHNEIDER]: Do you know who does?

21 A [MR. [REDACTED]]: I do not.

22 Q [MR. SCHNEIDER]: Besides Mr. Hamdan?

23 A [MR. [REDACTED]]: I do not.

1 Q [MR. SCHNEIDER]: Did you watch his testimony the other day?

2 A [MR. ██████████]: No, sir.

3 Q [MR. SCHNEIDER]: Based on your involvement in this case----

4 **[Pause.]**

5 MJ [CAPT ALLRED]: Do I look impatient?

6 CDC [MR. SCHNEIDER]: Well, I was hoping you looked impatient as

7 opposed to confused.

8 MJ [CAPT ALLRED]: Well, I have to look over my glasses because

9 they're reading glasses and I can't see. Please go ahead.

10 CDC [MR. SCHNEIDER]: I don't have much more, confusing or

11 otherwise.

12 Q [MR. SCHNEIDER]: Agent ██████████, based on your involvement in

13 this case and the considerable time that you've invested in

14 investigations and interrogations of Mr. Hamdan and others, can you

15 shed any light at all, any light at all, on what happened to Mr.

16 Hamdan 6 days after he was apprehended through the end of December

17 2001?

18 A [MR. ██████████]: No, sir. I have no information about that.

19 Q [MR. SCHNEIDER]: Have you ever seen any reports of his

20 interrogations during that period?

21 A [MR. ██████████]: No. The only--again, and prior to the

22 jurisdiction hearing in December, I was requested to review the

23 so-called detention interview.

1 Q [MR. SCHNEIDER]: Capture video?

2 A [MR. [REDACTED]]: Capture video.

3 Q [MR. SCHNEIDER]: I'm not going to get into the specifics
4 given the court's ruling.

5 MJ [CAPT ALLRED]: Thank you.

6 Q [MR. SCHNEIDER]: Well, to the extent I didn't ask already,
7 you can't shed any light on how Mr. Hamdan was treated before he was
8 sat down for those videotaped interrogations. Can you?

9 A [MR. [REDACTED]]: That's correct. Other than reading about the
10 report I think of the checkpoint, I believe it was. But other than
11 that. And I don't know if I read that through inside channels or
12 open press.

13 Q [MR. SCHNEIDER]: The last subject, the timing of your
14 interview. Would you agree generally with what I've heard as the
15 utility of trying to get an interrogation done sooner rather than
16 later? The better information the sooner you get?

17 A [MR. [REDACTED]]: Sooner is better.

18 [END OF PAGE]

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1 Q [MR. SCHNEIDER]: Sooner is better. In this instance, let's
2 say there was an opportunity to interrogate Mr. Hamdan, well, let's
3 say within the first 30 days of his apprehension. Generally
4 speaking, would you consider that more reliable than an interview
5 that takes place a couple years later? Generally speaking.

6 A [MR. [REDACTED]]: Generally. But depending on who is
7 conducting the interview, from my experience.

8 Q [MR. SCHNEIDER]: Precisely.

9 A [MR. [REDACTED]]: Yeah.

10 Q [MR. SCHNEIDER]: Now, there were a number of interviews that
11 we know about that occurred between January 30, 2002 and when you
12 arrived on the scene on May 17, 2002. Right?

13 A [MR. [REDACTED]]: Yes, sir.

14 Q [MR. SCHNEIDER]: Some perhaps 25 separate reports before you
15 arrived on the scene. Correct? Does that sound about right?

16 A [MR. [REDACTED]]: I wouldn't challenge your count.

17 Q [MR. SCHNEIDER]: Along with some 21 FBI agents and 19
18 representatives from other investigative agencies, before you arrived
19 on the scene. Does that sound about right?

20 A [MR. [REDACTED]]: That sounds about right.

21 [END OF PAGE]

1 Q [MR. SCHNEIDER]: And that doesn't take into account any
2 interrogations that may have occurred between the capture video and
3 late November 2001 and January 30, 2002. Correct?

4 A [MR. [REDACTED]]: I would presume that's correct. But I don't
5 know.

6 Q [MR. SCHNEIDER]: And you've never seen Mr. Hamdan until May
7 17, 2003. Right?

8 A [MR. [REDACTED]]: That's correct.

9 Q [MR. SCHNEIDER]: Based on your understanding of what he had
10 said to others, before we move on, is it fair to say that he had
11 provided a lot of information to various other people before you
12 arrived?

13 A [MR. [REDACTED]]: Information, yes.

14 Q [MR. SCHNEIDER]: Would it be fair to say that the frequency
15 of his interrogations had tapered off after December of 2002, until
16 you arrived?

17 A [MR. [REDACTED]]: I'm uncertain of that.

18 Q [MR. SCHNEIDER]: Would it surprise you to know that some 21
19 or 22 interrogations, one of them lasting two weeks, had occurred
20 before the end of the year 2002, but only four relatively minor
21 interrogations in the five months, five and a half months before you
22 arrived in 2003?

23 A [MR. [REDACTED]]: You asked me if I'm surprised?

1 Q [MR. SCHNEIDER]: Would that surprise you?

2 A [MR. ██████████]: I'm not sure if it would surprise me.

3 Q [MR. SCHNEIDER]: Did you understand in any way that the

4 purpose of your interrogation was to try to summarize, to capture a

5 lot of information that may that been supplied to others, and put in

6 one comprehensive report if you were able?

7 A [MR. ██████████]: Not exactly.

8 Q [MR. SCHNEIDER]: Well, then how, if not exactly?

9 A [MR. ██████████]: Our tasking, myself and my partner, was to

10 conduct a top tier, A level, as best interview as possible, with

11 Salim Hamdan.

12 Q [MR. SCHNEIDER]: One that was suitable for you to testify to

13 as a witness?

14 A [MR. ██████████]: Yes, sir.

15 Q [MR. SCHNEIDER]: And you testified quite a bit?

16 A [MR. ██████████]: Yes, sir.

17 Q [MR. SCHNEIDER]: Did it ever occur to you that you were

18 selected in part because you are a very good witness?

19 A [MR. ██████████]: At the risk of turning red and sounding

20 boastful?

21 Q [MR. SCHNEIDER]: You're under oath.

22 A [MR. ██████████]: I would not argue with that. Yes, sir.

23 CDC [MR. SCHNEIDER]: Thank you.

1 CTC [MR. MURPHY]: Your Honor, just a little follow-up.

2 **REDIRECT EXAMINATION**

3 **Question by the trial counsel:**

4 Q [MR. MURPHY]: Special Agent [REDACTED], on cross you were asked
5 a number of questions about your rough notes.

6 A [MR. [REDACTED]]: Yes, sir.

7 Q [MR. MURPHY]: Do you recall in the first two pages you
8 outlined in some considerable detail the various creature comforts
9 and environmental issues that you reported when you first had contact
10 with Mr. Hamdan?

11 A [MR. [REDACTED]]: Yes, sir.

12 CTC [MR. MURPHY]: Your Honor, may I show the agent the rough
13 notes, and ask him to talk about the first few pages? May I
14 approach?

15 CDC [MR. SCHNEIDER]: It's beyond the scope, but I don't feel
16 strongly about it.

17 CTC [MR. MURPHY]: Your Honor, there was questioning about the
18 content of the rough notes, and questions about----

19 MJ [CAPT ALLRED]: If the objection is scope, I will overrule
20 that. Are you going to have these pages marked as an appellate
21 exhibit then, and attached to the record?

22 CTC [MR. MURPHY]: Yes. In fact, I would like to offer that the
23 entire rough notes as the next appellate exhibit.

1 CDC [MR. SCHNEIDER]: For purposes of this hearing, no
2 objection. And we have a preference for the entirety of the document
3 rather than excerpts.

4 MJ [CAPT ALLRED]: Okay. Well, the entirety can be admitted as
5 an appellate exhibit then. Go ahead.

6 CTC [MR. MURPHY]: I believe we're up to 266.

7 **[APPELLATE EXHIBIT 266.]**

8 CTC [MR. MURPHY]: Your Honor, should I hand it to the bailiff
9 or approach myself?

10 MJ [CAPT ALLRED]: The bailiff can do it.

11 Q [MR. MURPHY]: Agent [REDACTED], I really only want you to focus
12 on the first two pages. Can you tell us what the entries on these
13 first two pages are intended to report?

14 A [MR. [REDACTED]]: Yes. They were--that's my handwriting.
15 Notations about the start, stop of the interview, any breaks. Items
16 offered, such as food, drink, when it was accepted, when it was
17 declined.

18 Q [MR. MURPHY]: You went through some detail to make sure you
19 were reporting the entire climate, I would call it, under which this
20 interview was taking place. Is that right?

21 A [MR. [REDACTED]]: Yes, sir.

22

23

1 Q [MR. MURPHY]: Could you tell us the entries that you
2 carefully noted in those two pages?

3 A [MR. [REDACTED]]: Read some?

4 Q [MR. MURPHY]: Just run right through them. They're not
5 lengthy, but I want to get a flavor in the record and your comments
6 on the details in which you reported the climate of the interview.

7 A [MR. [REDACTED]]: Date, 17 May, Salim Ahmed Salim Hamdan. And
8 then the number assigned at Guantanamo. Enters 0935, warm, extended
9 greetings. Water offered, slash, declined. Tea. Notation,
10 parenthetically, green and red, at 11:15. Takes. Fig Newtons,
11 raisins and dates, all with a notation "accepted." Prayer break 1140
12 to 1200. Bathroom 1215. Break 1340, 1345. Bathroom 1410. Tea and
13 Fig Newtons between 1345, 1430.

14 MJ [CAPT ALLRED]: I get the gist of it. Is there more that you
15 want there?

16 CTC [MR. MURPHY]: I think so.

17 Q [MR. MURPHY]: Is it fair to say that you carefully recorded
18 and provided a very comfortable environment in which this interview
19 took place?

20 A [MR. [REDACTED]]: That's correct.

21 Q [MR. MURPHY]: You were very attentive to his creature
22 comforts?

23 A [MR. [REDACTED]]: Yes, sir.

1 Q [MR. MURPHY]: And the rest of the document of course will be
2 in the record for the court's review.

3 CTC [MR. MURPHY]: Your Honor, I have no further questions.

4 MJ [CAPT ALLRED]: Okay. Thank you.

5 CDC [MR. SCHNEIDER]: Just one last question.

6 **RECROSS-EXAMINATION**

7 **Question by the defense counsel:**

8 Q [MR. SCHNEIDER]: Policy permitted Fig Newtons, but did not
9 permit the advisement of rights?

10 A [MR. REDACTED]: Policy permitted Fig Newtons. Yes, sir.
11 Advisement of rights was not in policy at that time.

12 CDC [MR. SCHNEIDER]: Thank you.

13 MJ [CAPT ALLRED]: Thank you. Why don't you retrieve that from
14 the witness?

15 Do you want me to read all these notes, or are they just
16 attached to the record for the sake of----

17 CTC [MR. MURPHY]: ----I believe the government and the defense
18 both agree that the entire notes should come in. The government is
19 focusing only on the first two pages.

20 CDC [MR. SCHNEIDER]: There's no suggestion on my part that you
21 need to read the balance in order to understand the context. So,
22 read as little as you would like, from the defense's standpoint.

1 MJ [CAPT ALLRED]: Very good. Okay. Has everyone finished then
2 their examination of Special Agent [REDACTED]?

3 CTC [MR. MURPHY]: We are, Your Honor.

4 MJ [CAPT ALLRED]: Thank you, sir, for your testimony this
5 morning.

6 **[The witness was excused and withdrew from the courtroom.]**

7 MJ [CPT ALLRED]: I think we need a little comfort break for
8 those in the courtroom. I don't think we have any Fig Newtons
9 available, but we can take a break and get some water.

10 Why don't we take 15 or 20 minutes? Shall we?

11 **[The R.M.C. 803 session recessed at 1049, 17 July 2008.]**

12 **[The R.M.C. 803 session was called to order at 1125, 17 July 2008.]**

13 MJ [CAPT ALLRED]: Court is called to order. And Mr. Trivett
14 has returned to the courtroom. Outstanding. And it looks like
15 everyone else is still here.

16 Okay. Let's see. Government, I understand you had some
17 additional documentary evidence to offer?

18 CTC [MR. TRIVETT]: Yes, sir, we do. We have specifically two
19 affidavits--may I approach? One from a Major [REDACTED] at JTF-
20 GTMO, and the other from a Special Agent [REDACTED], Criminal
21 Investigative Task Force.

1 We would also like to offer as one exhibit all statements
2 made by the accused, not just--or, throughout the course of his
3 questioning in U.S. custody.

4 MJ [CAPT ALLRED]: As one exhibit?

5 TC [LCDR STONE]: Well, or appellate--however you want to order
6 them, sir. But it's to be considered in total.

7 MJ [CAPT ALLRED]: Did you hand it to the clerk or to the
8 reporter? That's it there? So these are all the statements we're
9 litigating their admissibility of?

10 TC [LCDR STONE]: They're all the statements made by the
11 accused, which go into--so, yes. Our position is that they would all
12 be admissible. Recall the testimony of the agents that we will call
13 at trial specifically to deal with those admissions, and then may use
14 some of the others, adopting the hearsay exception under Rule 804.

15 MJ [CAPT ALLRED]: Okay. Any objection to the declaration of
16 Major [REDACTED]?

17 DC [LCDR MIZER]: I have not seen it. We have that one, Your
18 Honor. But I'm not sure about the CITF declaration though.

19 MJ [CAPT ALLRED]: Show that to the defense, please.
20 Is this the same as the contents of the binder you have in your hands
21 there?

22 TC [LCDR STONE]: Yes, sir.

23 MJ [CAPT ALLRED]: In chronological order? Mostly.

1 TC [LCDR STONE]: Mostly.

2 MJ [CAPT ALLRED]: All right.

3 DC [LCDR MIZER]: No objection from the defense, Your Honor.

4 MJ [CAPT ALLRED]: Very well.

5 TC [LCDR STONE]: For the record, sir, we would also like for
6 you to consider, although they've previously been marked as testimony
7 from the jurisdictional hearing of Major [REDACTED] and the former
8 detainee Said Boujaadia from the hearing.

9 Now, the testimony has previously been taken and there is a
10 transcript of it. And so we're prepared to offer them as the next
11 appellate exhibits, but it's kind of already in the record, so we
12 would prefer not to do that; but just make sure that we plan to argue
13 from them and give you the opportunity to have them separately
14 admitted, if you choose to do so.

15 MJ [CAPT ALLRED]: I don't think they need to be separately
16 admitted, no. I remember the testimony of Major [REDACTED] and Mr.
17 Boujaadia, and have my notes in this book of what they said. But I
18 could also get the exact transcript from the court reporter, if
19 necessary.

20 TC [LCDR STONE]: And we would also be referring to and have you
21 consider the actual capture video that was taken, which has been
22 previously marked and admitted, as well as the affidavit of Salim

1 Hamdan of February of 2004, which has been bantered around and
2 attached to three-quarters of all filings, I think.

3 DC [LCDR MIZER]: Your Honor, just to be clear, we have no
4 objection to any of the evidence for the limited purpose of this
5 hearing.

6 MJ [CAPT ALLRED]: Very well.

7 TC [LCDR STONE]: And then we anticipate, sir, one more exhibit.
8 And as we talked about in an 802 with the defense and yourself
9 immediately before, that we would ask to hold open argument to allow
10 us the opportunity to present that document at a later time, and then
11 argue after that, probably after lunch.

12 MJ [CAPT ALLRED]: Fair enough.

13 Okay. The court reporter has just handed me four documents marked
14 "SECRET." Are these something in addition to what you just offered?

15 TC [LCDR STONE]: No, sir. Those are parts of the statements of
16 the accused.

17 MJ [CAPT ALLRED]: Okay. Individually marked.

18 TC [LCDR STONE]: Individually marked.

19 MJ [CAPT ALLRED]: Okay. I'll let the court reporter keep
20 custody of those until I'm ready to consult them. Thank you.

21 Okay. Is that all the evidence from the government then, for now?

22 TC [LCDR STONE]: For now. Yes, sir.

23 MJ [CAPT ALLRED]: Defense, do you have any additional evidence?

1 DC [LCDR MIZER]: No.

2 MJ [CAPT ALLRED]: Okay. Then I'm ready to receive arguments on
3 a different set of motions that are still pending. They've all been
4 filed by the defense. So Commander Mizer, whatever order you want to
5 take them in is fine with me.

6 DC [LCDR MIZER]: Your Honor, I'm going to address the Fifth and
7 Sixth Amendment jury right motion that we filed, which is D-043, Your
8 Honor.

9 MJ [CAPT ALLRED]: Very well.

10 DC [LCDR MIZER]: Your Honor, this morning I don't intend to
11 rehash entirely Mr. McMillan's arguments regarding *Boumediene*. For
12 the purposes of this motion, I'd like to address some aspects of
13 *Boumediene*; and then since the other two motions dealing with hearsay
14 and the speedy trial right also involve *Boumediene*, I will skip that
15 analysis to later on today.

16 I would point out again that *Boumediene* reaffirms the
17 holding of the *Insular Cases* that certain fundamental protections
18 apply in territories like Guantanamo Bay, Cuba, a territory that the
19 United States intends to hold indefinitely, and over which the United
20 States exercises full sovereignty, Your Honor.

21 This morning, in the court's ruling with respect to equal
22 protection, the court cited the *Mankichi* case, a 1903 case out of
23 Hawaii, saying that the Fifth and Sixth Amendment jury rights did not

1 apply in Hawaii for a number of practical considerations that applied
2 in Hawaii in 1903, and point out that those practical considerations
3 are not in effect here.

4 What I would also point out that in *Duncan versus*
5 *Louisiana*, a decision out of the *Warren* court in 1968, the Supreme
6 Court rejected the holding of *Mankichi* that the Fifth and Sixth
7 Amendment jury rights were not fundamental rights. And so, since
8 1903, there has been a holding by the court that that is in fact a
9 fundamental right.

10 And, really, I think that's a problem with many of the
11 government's arguments with respect to *Boumediene*, is that they cite
12 cases from the 1940s, they cite cases from the turn of the century,
13 and they ignore the incredible evolution of constitutional law that
14 took place primarily under the *Warren* court with respect to
15 fundamental constitutional rights. Instead, they invite this court
16 to follow the Supreme Court's holdings in *Eisentrager* from 1950, and
17 then the plurality opinion in *Verdugo-Urquidez* from the last decade.
18 But even the plurality opinion in *Verdugo-Urquidez*, if you read it
19 closely, supports the defense's arguments in this case.

20 The Court points out that: Before analyzing the scope of
21 the Fourth Amendment, we think it's significant to note that it
22 operates in a different manner than the Fifth Amendment, which is not
23 at issue in this case, the privilege against self-incrimination

1 guaranteed by the Fifth Amendment is a fundamental criminal right of
2 trial defendants.

3 And so even the Court's opinion in that case draws
4 distinctions between those fundamental trial rights that are
5 guaranteed or intended to guarantee a fundamentally fair trial and
6 those procedural rights like the Fourth Amendment.

7 Importantly, Your Honor--and the defense is not going to
8 argue in this case to illustrate the distinction in *Verdugo*, we're
9 not going to argue that in Takteh Pol, Afghanistan, the special
10 forces there had to contact a local Taliban magistrate to get a
11 search warrant for Mr. Hamdan's car. But those are fundamentally
12 different rights than rights that we're going to talk about later
13 today: Hearsay, the right against self-incrimination, the right to
14 be indicted by a grand jury, and to have the fundamental protection
15 of a jury trial. These are rights that certainly could be afforded,
16 whereas the Fourth Amendment is exempted.

17 Now, Your Honor, this court must not, respectfully, ignore
18 Justice Kennedy's concurring opinion in that case, because the
19 prosecution's case cites the majority holding.

20 MJ [CAPT ALLRED]: In which case?

21 DC [LCDR MIZER]: In *Verdugo-Urquidez*, Your Honor. These
22 statements that the Constitution doesn't apply without significant
23 connections--unless the individual has significant connections to the

1 United States. But you have to analyze that opinion by four members
2 of the Court, really, in concert with Justice Kennedy, who joins that
3 opinion but with expressed reservations, such as: I do not mean to
4 imply and the Court has not decided that persons in the position of
5 the respondent have no constitutional protections.

6 The prosecution seems to cite the opinion by four members
7 of the Court, which would certainly suggest that and the opinion in
8 *Eisentrager*, which I will address in a moment, for that proposition.

9 But if you look at Justice Kennedy's opinion in *Verdugo-*
10 *Urquidez*, you will see, Your Honor, just as the *Boumediene* majority
11 says, you should have seen this decision coming in prior precedent in
12 *Rasul*, *Boumediene* is plain to see in Justice Kennedy's concurring
13 opinion in *Verdugo-Urquidez*, where he applies practical
14 considerations and says exactly what I said before; that the Fourth
15 Amendment is not going to require us to go get a magistrate in Mexico
16 to execute a search warrant in Mexico. We're not dealing with the
17 Fourth Amendment in this case; we're dealing with fundamental trial
18 rights.

19 I think it's important, Your Honor, that the *Boumediene*
20 majority does not mention *Verdugo-Urquidez*, except to cite Justice
21 Kennedy's concurring opinion as an accurate statement of the law.

22 So the opinion for four members of the Court, what is
23 really a plurality opinion in *Verdugo-Urquidez*, even though Justice

1 Kennedy joins it and then essentially carves the heart out of the
2 opinion by the statements like this, that the Court does not decide
3 the constitutional--these individuals are entitled to no
4 constitutional protections simply because they have no significant
5 connections to the United States.

6 I think that Justice Scalia accurately points out on page
7 17 of his dissent when he is talking about *Verdugo-Urquidez* in
8 *Eisentrager*. And, in his opinion: It's a sad day for the rule of
9 law when such an important constitutional precedent is discarded
10 without an apologia much less an apology.

11 And so I think Justice Scalia correctly recognizes that the
12 continuing precedential value of the four-member opinion in *Verdugo-*
13 *Urquidez* and of *Eisentrager* itself is in serious doubt. And I think
14 that's quite correct.

15 I think that Mr. McMillan hit the nail on the head when he
16 said these decisions, particularly *Eisentrager*, are limited to the
17 facts, the peculiar circumstances at the time.

18 On page 25, Justice Scalia says--derides the majority for
19 establishing a manipulable functional task, which now this court must
20 apply and has applied this morning in the equal protection analysis
21 for the extraterritorial reach of habeas corpus and no doubt for the
22 extraterritorial reach of other constitutional protections as well.

1 And certainly *Boumediene* and the intent of *Boumediene* is acknowledged
2 by Justice Scalia and two other members of the Court.

3 Still, Your Honor, the government on page 3 of its reply
4 relies upon *Eisentrager*. It relies upon *Eisentrager* and it relies on
5 *Quirin* as if it were 1950 and 1942 respectively, particularly one
6 quote that: If the Fifth Amendment invests aliens in unlawful action
7 against us with immunity from military trial, it puts them in a more
8 protected position than our own soldiers, because American citizens--
9 let me allow the translator catch up, Your Honor--American citizens
10 conscripted into military service are thereby stripped of their Fifth
11 Amendment rights and as members of the military establishment are
12 subject to its discipline.

13 Again, Your Honor, the prosecution ignores the evolution of
14 constitutional law that occurred under the *Warren* court. It is
15 universally accepted now that constitutional rights do apply to
16 military service members, with the exception of the Fifth and Sixth
17 Amendment jury rights because they are specifically excepted from
18 those protections in the Constitution itself.

19 Earl Warren wrote a famous law review article published in
20 *NYU Law Journal* in the 1960s that is oft quoted. It says that,
21 "Military members do not surrender the protections of the Bill of
22 Rights simply because they have doffed their civilian clothes." And
23 that is a more accurate reflection, not what is in *Eisentrager* saying

1 that simply we can't afford any combatants rights because our
2 soldiers themselves are not afforded rights.

3 The government relies heavily on *Quirin*, another case of
4 questionable precedential value. As Justice Scalia notes, in *Hamdi*,
5 by *Quirin*'s own language it's a very limited holding: We apply this
6 holding today, we hold this today on the specific facts of this case.
7 Scalia also notes in his dissent in *Hamdi* that *Quirin* was not the
8 Court's finest hour. And you have one of the most ardent defenders
9 of the President's war powers throughout the litigation that has
10 taken place these past six years criticizing *Quirin*. I think the
11 government has almost an untenable position to say it continues to
12 have legal precedent--value as legal precedent.

13 In that case, Your Honor, Mr. Haupt, an American citizen,
14 was executed after trial by military commission without a jury, and
15 the Supreme Court hadn't issued its final opinion before that
16 sentence was carried out. I don't still think that that's the
17 precedent that this Court should be applying. It is a relic of 1942.

18 But still, again, as of *Eisentrager*, on page 6 of the
19 government's brief, they point out that: If Haupt, a U.S. citizen,
20 was not entitled to rights under the Fifth and Sixth Amendments; it
21 is remarkable to claim that an alien unlawful enemy combatant should
22 receive greater rights.

1 Again, that's not the state of the law, Your Honor. It
2 cannot possibly be the state of the law. And I think it's telling
3 that there are no American citizens down there, even though the
4 M.C.A. says that it will not apply to American citizens, certainly
5 under the previous military commissions where the President exerted
6 his authority under *Quirin*, no Americans were brought before a
7 military commission, Your Honor.

8 *Quirin* must not only be confined to its facts, but has to
9 be considered in its historical context, Your Honor. I think in the
10 *Hamdan* decision, the Court noted that military commissions have
11 always paralleled the practice in courts-martial. And military
12 courts-martial in 1942 were an abomination, Your Honor; simply put.
13 We don't even know how many Americans were killed as a result of
14 firing squads and in summary executions in World War II. It's
15 anywhere from 100 to 300; and just guessing, because we don't know.
16 There were trials without lawyers. And I would invite the court's
17 attention to famous trials, like the trial at Fort Lawton, the trial
18 at Fort Lawton involving an alleged lynching of an Italian POW by 43
19 black defendants, where they were given two lawyers and ten days to
20 prepare for that potentially capital case. That was justice,
21 military justice in 1944. It's the justice that *Quirin* received.
22 It's not something that the United States or this court should be
23 relying on or proclaiming to the world that these men are getting

1 greater rights than were afforded those black defendants or the
2 defendants in *Quirin*.

3 I think that it's important also to point out, Your Honor,
4 that Kenneth C. Royal, if you read the legislative history of the
5 Uniform Code of Military Justice, was one of--was instrumental in
6 pushing that litigation through Congress. He later becomes a
7 Secretary of the Army, But he was one of the defendants' lawyer in
8 *Quirin*. So there's a congressional effort to ensure that decisions
9 like *Quirin* and like Fort Lawton would not happen again.

10 Again, it's not 1942, and there are many practical reasons that we
11 should not be following precedence like *Yamashita*, *Quirin*,
12 *Eisentrager*. Instead, we should look to *Boumediene* and the
13 fundamental trial rights that are guaranteed by our Constitution.

14 Our founding fathers experienced tyranny and the abusive
15 trial practices of the colonial courts, and they enshrined in that
16 document the fundamental protections that they felt were necessary to
17 guarantee a fair trial.

18 So, Your Honor, we must look to the instant cases and to
19 *Boumediene's* practical considerations. And when we do that, we
20 realize that there are really no practical impediments to the
21 implementing these rights. Indeed, for this class of individuals, al
22 Qaeda and Taliban, we have afforded enemy combatants these rights, in
23 the *Paracha* case, the case of the embassy bombers. Ironically, one

1 of the embassy bombers will be tried here before a military
2 commission years after his co-conspirators have been convicted and
3 several of them are serving life sentences for charges that they were
4 convicted of in federal court, Your Honor. *Moussaoui, Padilla, Reid,*
5 *the Rassam case,* all of these in federal court.

6 The government claims in two points with respect to the
7 practical consequences of enforcing the Constitution here at
8 Guantanamo Bay: A civilian jury would have to be flown to this
9 island. Page 9. Just like the military members that are scheduled
10 to be flown here on Saturday. So I don't see the distinction
11 whatsoever.

12 They talk about military members having to be flown off the
13 battlefield. But, again, we have done that in federal court.
14 National security hasn't been endangered.

15 These arguments simply lack credibility.

16 In summary, Your Honor, there are no practical obstacles to
17 the application of the jury right there. John Walker Lindh was
18 convicted based upon alleged crimes or crimes that occurred in
19 Afghanistan, and they were able to seat a jury in John Walker Lindh's
20 case. They could certainly seat a jury for an indictment in this
21 case and for ultimately a jury to decide in accordance with
22 fundamental American principles Mr. Hamdan's guilt.

1 If there are no questions, Your Honor, I would be happy to
2 answer any questions. That's all I have.

3 MJ [CAPT ALLRED]: No. Thank you. I appreciate that argument.
4 I know that the Supreme Court's jurisprudence has evolved with
5 respect to whether or not the jury trial right is fundamental since
6 the *Insular Cases*. I cited those as kind of a review of the Court's
7 jurisprudence on extraterritorial application of the Constitution,
8 but I fully appreciate that distinction. Thank you.

9 DC [LCDR MIZER]: For the record, it's D-048. I apologize, I
10 think I said 043. Thank you, Your Honor.

11 MJ [CAPT ALLRED]: Thank you.

12 CTC [MR. MURPHY]: Your Honor, I would like very brief argument
13 since we believe all of our arguments are contained in the briefs.

14 But Commander Mizer said there's no practical reason why a
15 jury trial or Fifth and Sixth Amendment rights would not apply here.
16 But there certainly is a legal reason why they won't apply. The
17 M.C.A. was passed by Congress and it excluded as provisions.

18 Now, I think the thrust of the defense's argument--

19 MJ [CAPT ALLRED]: Well, let's not rely on that argument,
20 because the M.C.A. also excluded *habeas corpus*. So let's look at
21 practical factors like the court urges to look in.

22 CTC [MR. MURPHY]: Practical matters.

1 MJ [CAPT ALLRED]: Like the court urges to look at in
2 *Boumediene*.

3 CTC [MR. MURPHY]: Right. Well, I would like to focus
4 specifically on the holding of *Boumediene*, which is very narrow.
5 What the court did in *Boumediene* was find unconstitutional section 7
6 of the M.C.A. And it used the word "only," it only did that.

7 The defense certainly was hoping, and many of us were
8 looking with great interest, to see if there would be a more
9 expansive ruling from the Supreme Court. And it certainly could have
10 done so if it wanted to. And it carefully crafted that opinion,
11 although it provided vast discussion on historical issues discussion
12 on the *Insular Cases*, but did not ultimately come down where the
13 defense really wants you to come down on, which is saying that
14 there's an expansive constitutional series of rights. They get a
15 *habeas corpus* review, but that's it.

16 When the defense asks for a jury trial and the Fifth and
17 Sixth rights, they're asking for something more than service members
18 get. In a court-martial service members are not entitled to that.
19 And as a practical matter, they're asking that enemy combatants, or
20 in this case an alien unlawful enemy combatant, enjoys something more
21 than our own service members receive.

22 The government would argue that's a practical consideration
23 that we can't bring down a civilian jury for these proceedings when

1 we don't do the same for our service members. We don't do the same
2 for our service members even when they're court-martialed within the
3 confines of the United States.

4 The defense criticizes much of the case law that the
5 government relies on, particularly *Eisentrager* and *Quirin*. Yet, both
6 of those cases remain in full force. They are not overruled.

7 The government believes that if you take a narrow view of
8 *Boumediene*, which we believe is appropriate, and you consider that it
9 is impractical to--in the case of indictment, to send this case off
10 to a grand jury, presumably sitting somewhere in the United States,
11 then send down civilian jurors to hear a trial overseas--and we are
12 in an overseas location--that there are logistics and practical
13 applications or concerns to that. Moreover, the case doesn't give
14 them that. It gives them habeas review. It doesn't give them Fifth
15 Amendment or Sixth Amendment rights.

16 What the court did in *Boumediene* was really a ratification
17 of all of the other provisions of the M.C.A. And we are talking
18 about a statute that was passed by Congress, signed by the President,
19 reviewed by the Supreme Court most closely. The only one area that
20 the Supreme Court chose to carve out was a review. The rest of the
21 argument, Your Honor, I believe is well represented in our written
22 filings, unless the court has any questions.

1 MJ [CAPT ALLRED]: I can't think of anything. I mean, it's true
2 that the Court said we only hold unconstitutional this narrow
3 provision. But that was the only provision before it, wasn't it? It
4 would have had to jump off the train to go address other parts of the
5 M.C.A. Don't you think so?

6 CTC [MR. MURPHY]: It would have been a more expansive decision,
7 there's no question. There are certainly examples from decisions
8 that are more expansive than the parties expect from the Supreme
9 Court. As--quite frankly, many people were looking to see just how
10 expansive it was. And, but perhaps it could have addressed Fifth and
11 Sixth Amendment issues. I think what's particularly telling----

12 MJ [CAPT ALLRED]: Were those issues briefed?

13 CTC [MR. MURPHY]: Your Honor?

14 MJ [CAPT ALLRED]: Were those issues briefed?

15 CTC [MR. MURPHY]: They weren't. Their focus was, as you say,
16 on the--but I think what is telling too, is in the dicta. I mean,
17 even if you look only at the holding and say, that's narrow, but that
18 was the only issue before us. If the Court was signaling that there
19 were broader constitutional rights, there could have been very clear
20 dicta that they were expecting to see additional problems. And if
21 that was communicated clearly, I think the defense would have a much,
22 much better claim that other parts of the constitution apply. But
23 even when you track through the exhaustive historical analysis, you

1 find no dicta to suggest that there's other constitutional issues in
2 this.

3 MJ [CAPT ALLRED]: Okay. Thank you very much.

4 DC [LCDR MIZER]: One moment, Your Honor. Your Honor, I think
5 that we would propose that we argue the speedy trial motion and then
6 take a lunch recess, if that's acceptable to the court and the
7 government.

8 MJ [CAPT ALLRED]: Sure. I don't really care what order we go
9 in. Are you ready for the speedy trial motion?

10 CTC [MR. MURPHY]: I think so, Your Honor.

11 MJ [CAPT ALLRED]: Let's do that then.

12 DC [LCDR MIZER]: We'll be very brief, Your Honor. We thank the
13 court for indulging on the last motion with respect to *Boumediene*.

14 I think it would be undeniable that if we were sitting in a
15 federal courthouse right now that there would have been a speedy
16 trial violation in this case. If you examine the factors set forth
17 considering the Supreme Court's decision, you see that each of those
18 factors weighs in Mr. Hamdan's favor: The length of the delay in
19 this case. It's been seven years since his arrest, and there are
20 many years, two or three years where the government appears to have
21 been doing nothing to bring Mr. Hamdan to trial if indeed they
22 suspected that his offenses were criminal.

1 The reasons for delaying, Your Honor--and I want to briefly
2 pause on this factor, because I think Mr. Murphy the other day in one
3 of the 802s suggested that it would be ironic, but at the same time
4 it is in fact happening, that Mr. Hamdan is before a federal court
5 asking for a stay of these proceedings and at the same time demanding
6 a speedy trial right.

7 Mr. Hamdan has long desired a speedy trial that comports
8 with all of the protections of the United States Constitution,
9 protections which are not limited by their own terms to aliens, to
10 unlawful enemy combatants, protections that suggest by their own
11 terms all persons are entitled to the Fifth and Sixth Amendment
12 rights. You will see that again in *Verdugo-Urquidez*, that
13 distinction between the Fifth and Sixth Amendment rights and the
14 Fourth Amendment rights. And so while we have sought delays, it is
15 to ensure fundamental rights have been complied with. And we're
16 doing that again today as I speak.

17 I think, Your Honor, you are probably wondering what the
18 *Moreno* case out of the CAAF several years ago, and I think there's an
19 analogy that can be made there with respect to the reasons for delay.
20 And at the Navy and Marine Corp Appellate Defense Division, which was
21 understaffed, the defendants were requesting delay because the
22 government had failed to provide them attorneys who had been briefed
23 on their petitions in an adequate manner, and so the defendants like

1 Corporal Moreno spent their entire--or served their entire, in his
2 case, six-year prison sentence before being afforded an appeal, which
3 he won. And the government came before the CAAF--in that case, much
4 like they would do here today--and said, hey, he asked for a delay.
5 But the delay was because the government failed to afford him the
6 fundamental right, which was counsel on appeal, which has long been
7 recognized.

8 And, yes, we have asked for delay, but because we've been
9 seeking the constitutional protections that now *Boumediene* commands
10 that Mr. Hamdan be afforded.

11 Assertion of the right, Your Honor; the third factor. If
12 you look at Exhibit--of course, we were unable to find the original
13 February 12, 2004 assertion of the right, but Judge Robertson
14 acknowledged it in his order. We do have some later pleadings before
15 the first commission where it was referenced. So February 12, 2004,
16 Mr. Hamdan asserted his right to a fair speedy trial. Mr. Hamdan has
17 been denied that right, Your Honor.

18 Prejudice. I would point out that in the *Doggett* case,
19 another Supreme Court case, progeny of *Barker versus Wingo*, there's a
20 presumption of prejudice given approximately eight years of delay in
21 that case. I believe that Mr. Hamdan is entitled to that equal
22 presumption of prejudice in this case.

1 If you look at those three forms of prejudice, oppressive
2 incarceration, prejudice to the trial, anxiety--I think you have
3 before you evidence dealing with Mr. Hamdan's anxiety, the conditions
4 of his confinement. And unlike Mr. Doggett, who was out of the
5 country and then lived for a number of years under his own name
6 openly in the United States, Mr. Hamdan has been incarcerated for
7 seven years, oppressive incarceration, Your Honor. To my knowledge,
8 he has received two, perhaps three phone calls to his wife and two
9 daughters in Yemen during that entire seven years. I don't know that
10 we would do that to any defendant in the United States.

11 Prejudice to the trial, Your Honor. I can't tell you how
12 many witnesses that I've spoken to who say things like, I can't
13 remember. I don't know the answer to that question. Sir, you know
14 that was seven years ago. And had the United States brought Mr.
15 Hamdan to trial in 2002, in 2003 via court-martial, which I think
16 everyone would have agreed would have been permissible at the time, I
17 don't think that we would be suffering that exact same prejudice.

18 I think it is undeniable, Your Honor, that Mr. Hamdan has
19 been denied a speedy trial, and we would ask the court to dismiss the
20 charges with prejudice.

21 If the court has no questions? I promised I would be
22 brief, and I have been.

1 MJ [CAPT ALLRED]: You have been indeed. Well, it is well
2 argued. I don't know what to say.

3 So, in your mind, *Barker v. Wingo*, that's the test I should
4 apply. Is that right?

5 DC [LCDR MIZER]: The four factors, Your Honor. It's the test
6 that the CAAF applied for speedy trial and Article 10 analysis, which
7 we're not asserting applies here, and for post-trial delay as in
8 *Moreno*. It's the four factors, Your Honor.

9 MJ [CAPT ALLRED]: Okay. I'll ask the government if they agree
10 that that's the controlling test.

11 CTC [MR. MURPHY]: No, Your Honor. We believe that you do not
12 even get to that analysis because the Fifth and Sixth Amendment
13 rights do not apply.

14 I won't repeat the same argument I just made a moment ago,
15 but it certainly applies with equal force here. I would highlight
16 one important factual difference. Commander Mizer talked about----

17 MJ [CAPT ALLRED]: So wait a minute. So your position is that
18 he has no right to a speedy trial?

19 CTC [MR. MURPHY]: Right. Correct. Because that's a
20 constitutional right. And that----

21 MJ [CAPT ALLRED]: Do you think he has a right to a speedy trial
22 under the Geneva Conventions, under Common Article 3, some basic

1 principle of humanity or fair treatment or minimal protections such
2 as that article accords to unlawful combatants?

3 CTC [MR. MURPHY]: Your Honor, as an unlawful enemy combatant,
4 he can be held for the duration of hostilities. The argument that
5 Mr. Mizer, that Commander Mizer made is relevant to the court's
6 point, which is any defendant in the United States would enjoy the
7 speedy trial right, which of course is true. But Mr. Hamdan is not
8 any defendant; he's an alien unlawful enemy combatant. Under the law
9 of war, he can be held for the duration of hostilities. And I think
10 that's an uncontroverted point. So the fact that he has been held
11 for a lengthy period of time is something the government would have a
12 right to do whether he was tried or not.

13 Now, the delay has been in part due to litigation,
14 including an original plan of trial under commissions that this very
15 defendant's case was found to violate the Constitution. And Congress
16 went back and created another statute. We've been at this case from
17 referral for over a year arguing extensive motions, properly filed by
18 the defense, but all of which take time.

19 So it is the government's position that he is held and can
20 continue to be held until the end of hostilities. Delay has been as
21 a result of litigation, including all the way up to the Supreme
22 Court. And now about a year, a little over a year since referral of
23 these charges, the government does not believe that he is entitled to

1 any speedy trial review. And, moreover, we are days away from giving
2 that in that trial.

3 I do think it is interesting, when the government in its
4 filings does say much of the delay is due to litigation strategy, it
5 is not a small point to minimize the reference that there's been sort
6 of a double-headed attack on this very issue. This morning, and it's
7 probably over right now, a member of the defense team is arguing this
8 trial should not go forward, it should be stopped. The same trial
9 team is here before you saying it's been too long. Those are
10 entirely inconsistent arguments, properly made, but inconsistent.

11 So the government would urge the court to find no
12 constitutional rights, *Boumediene* didn't change it. Congress has
13 established they're not entitled to the right. And, we're ready to
14 try this case in a matter of days.

15 MJ [CAPT ALLRED]: When do you think--let's assume that there is
16 a right to a speedy trial. When does that clock start to run?

17 CTC [MR. MURPHY]: Well, it's difficult, Your Honor, for the
18 government to give a starting point since we believe there's no
19 entitlement whatsoever. So I will say I'm unable to answer that,
20 because our position is there's no entitlement; therefore, we could
21 not have the ability to find a date.

22 MJ [CAPT ALLRED]: When does the clock stop running?

1 CTC [MR. MURPHY]: I think in terms of release, it would be at
2 the end of hostilities if the individual was simply held as a
3 combatant. So the government could hold Mr. Hamdan all the way up to
4 the point of the end of hostilities. It could hold him longer if he
5 was convicted and sentenced beyond that in commission. But because
6 we feel there's no right at all, the government's unable to give any
7 parameters within what's the earliest and what's the latest date.

8 MJ [CAPT ALLRED]: Okay. Well, do you know if there's
9 considered to be a right to a speedy trial under the Common Article
10 3?

11 CTC [MR. MURPHY]: It's not stated explicitly, as the court
12 notes. You could perhaps read in language that would be supportive
13 of that, but there's certainly no deadlines in place there that the
14 court would say the government's crossed some sort of bright line as
15 set forth in Geneva.

16 MJ [CAPT ALLRED]: Let me ask this question, I guess. Well,
17 maybe that's not a good question.

18 Okay. Thank you very much for your argument.

19 CTC [MR. MURPHY]: Thank you, Your Honor.

20 MJ [CAPT ALLRED]: So we're ready to break for lunch? We've
21 exhausted our energies for the morning?

22 DC [LCDR MIZER]: Yes, Your Honor. The defense has.

1 MJ [CAPT ALLRED]: Do we want to reconvene at 2:00, then, or
2 sometime earlier than that?

3 DC [LCDR MIZER]: We would propose 2:00, Your Honor.

4 MJ [CAPT ALLRED]: Mr. Hamdan votes for 2:00. I think that's
5 two votes.

6 CDC[MR. SCHNEIDER]: Let the record show Mr. Hamdan is smiling
7 in response to that.

8 MJ [CAPT ALLRED]: What else do we have scheduled? I don't want
9 to stay too late at night. So if we reconvene at 2:00, then we have
10 three hours or so, on the clock.

11 CDC [MR. SCHNEIDER]: We have argument on coercion.

12 MJ [CAPT ALLRED]: Argument on three or four more motions.

13 CDC [MR. SCHNEIDER]: Argument on self-incrimination.

14 TC [LCDR STONE]: Self-incrimination, hearsay. And then there's
15 a couple of other motions in limine.

16 MJ [CAPT ALLRED]: Well, if we have to come back tomorrow, I
17 guess we can do that. Why don't we stand in recess until 1400?

18 **[The R.M.C. 803 session recessed at 1209, 17 July 2008.]**

19 **[The R.M.C. 803 session was called to order at 1403, 17 July 2008.]**

20 MJ [CAPT ALLRED]: Excellent. Please be seated. Are we, in
21 fact, ready or do we need a few minutes? Okay. I guess I don't know
22 where we are. Do we have evidence to present, or are we arguing the
23 next motion?

1 DC [LCDR MIZER]: Your Honor, I think that I'm going to address
2 the hearsay motion very, very briefly. And then Professor Swift is
3 going to get into the al Qaeda 101 motion.

4 Your Honor, what we'll do is I'll briefly address hearsay,
5 and then Mr. Trivett, if it's acceptable, can address al Qaeda 101,
6 and we will respond. Professor Swift will respond.

7 MJ [CAPT ALLRED]: Very good.

8 DC [LCDR MIZER]: Your Honor, again, I won't belabor *Boumediene*,
9 but I would invite the court's attention to the one passage.

10 MJ [CAPT ALLRED]: Let me interrupt you for a moment.
11 Apparently the Arabic isn't audible.

12 Would you go see if they're upstairs, please?

13 Okay. We're going to take a recess. It looks like we
14 can't find the interpreters.

15 **[The R.M.C. 803 session recessed at 1408, 17 July 2008.]**

16 **[The R.M.C. 803 session was called to order at 1409, 17 July 2008.]**

17 MJ [CAPT ALLRED]: The court is called to order.

18 Please continue, Commander Mizer.

19 DC [LCDR MIZER]: Thank you, Your Honor.

20 Again, I don't want to dwell on *Boumediene* except here to
21 mention one point in the Court's decision, which is at page 55 of the
22 slip opinion, where the Court is actually discussing the CSRT
23 provisions.

1 The Court says, quote: "Given that there are in effect no
2 limits on the admission of hearsay evidence, the only requirement is
3 that the tribunal deem the evidence is both relevant and helpful, the
4 detainee's opportunity to question witnesses is likely to be more
5 theoretical than real."

6 Your Honor, I think that that's really about what we're
7 going to see here, is the theoretical right to confront witnesses if
8 the Court adheres to the rules that are set out in the Manual For
9 Military Commissions, M.C.R.E. 402 allows for the admission of all
10 probative--or, all evidence having probative value. Essentially, the
11 same standard that evidence that would be helpful or that would make
12 the existence of a fact more or less probable.

13 Gone from the Military Commission's Rule of Evidence 402
14 are the robust protections under Military Rule of Evidence 402, which
15 explicitly discusses the Constitution, the Military Rules of
16 Evidence, and other federal statutes.

17 On page 6 of the government's response, they correctly note
18 that the *Hamdi* plurality allowed for the presentation or seemed to
19 accept the presentation of hearsay evidence at CSRT or habeas a
20 substitute, Your Honor. But this is not a habeas hearing. This is
21 not a hearing where we're determining whether Mr. Hamdan can be held
22 as an unlawful enemy combatant. We are now in the next couple weeks
23 going to hear evidence to determine whether or not Mr. Hamdan should

1 be convicted and whether or not he should potentially spend the rest
2 of his life in prison on these charges. We must have reliable
3 evidence, Your Honor, if we are going to--if Mr. Hamdan is going to
4 be allowed to confront his accusers, if this trial is going to be
5 fundamentally fair.

6 The prosecution will undoubtedly note that some war crimes
7 tribunals have permitted some forms of hearsay. I would note that
8 those international war crimes tribunals have been largely recognized
9 as affording fundamental rights. While they may have been deficient
10 in this one area, they have not been deficient in others, as this
11 commission has, as the defense has argued.

12 In fact, the Military Commissions Act appears to be a
13 cobbling together of a number of deficient rights, which cannot
14 possibly guarantee Mr. Hamdan a fair trial, and we have discussed
15 some of these today: Speedy trial, the admission of coercion, the
16 right to remain silent that Mr. Schneider is going to address here a
17 little bit later today.

18 It's strange, when the defense is quoting Justice Scalia so
19 much today, but I can't pass on the opportunity to quote a few
20 passages from *Crawford v. Washington*, Your Honor. The prosecution
21 cites Justice Rehnquist's dissenting opinion, which was joined only
22 by Justice O'Connor.

1 Justice Scalia says, quote: "Dispensing with confrontation
2 because testimony is obviously reliable is akin to dispensing a jury
3 trial because a defendant is obviously guilty. The Constitution
4 commands not that the evidence be reliable, but that reliability be
5 tested in a particular manner, by testimony on the crucible of cross-
6 examination."

7 Justice Scalia discussed the 1603 trial of Sir Walter
8 Raleigh, which is equally applicable today in this case in the 21st
9 century. And we recall that in 1603, Sir Walter Raleigh was called
10 before the Court of King's Bench, and issued his famous demand that
11 the court should call his accusers before his face, not Lord Cobham
12 writing letters from the tower, but they should call Lord Cobham into
13 his proceeding.

14 And today, Mr. Hamdan makes a similar demand; that Mr.
15 Hamdan's accusers should be called before his face, not hidden in
16 multiple layers of hearsay as the defense firmly believes is about to
17 take place in this proceeding.

18 Justice Scalia mentions Raleigh's case. He mentions the
19 Court of Star Chamber, which famously allowed the admission of
20 hearsay.

21 Your Honor, the defense has examined the evidence in this
22 case, and to our knowledge there is not one witness who is going to
23 say, "I saw Mr. Hamdan stopped at that roadblock and saw missiles in

1 the car." There are going to be individuals who said, "I went to the
2 roadblock, and Afghans told me that this man was stopped with
3 missiles in his car." Others will say that Afghans brought a car
4 with missiles in it, and told me that Hamdan is the man who was
5 driving that car. That's not reliable evidence that can send this
6 man to prison for the rest of his life, Your Honor. He must be
7 allowed to confront his accusers.

8 Your Honor, we simply ask that the Military Commission
9 apply the Military Rules of Evidence. And if the evidence is
10 admissible under one of those exceptions, as constrained by the
11 Supreme Court's ruling in *Crawford*, then it should be admitted. But
12 that should be the limitation and the guide that this court uses for
13 determining whether evidence is both probative and reliable, Your
14 Honor.

15 If the court has no questions, that concludes my argument.

16 MJ [CAPT ALLRED]: No, I don't have any questions. Thank you.

17 CTC [MR. TRIVETT]: Sir, may I have a moment?

18 MJ [CAPT ALLRED]: You may.

19 CTC [MR. TRIVETT]: Sir, the prosecution asks that it be able to
20 respond to the arguments by defense on the hearsay motion, and then
21 go right into *The al Qaeda Plan* admissibility motion, the motion to
22 pre-admit. A lot of them, the issues are intertwined, sir.

1 M.C.R.E. 802 and 803 stand for the proposition that hearsay
2 may be admitted on the same terms of any other evidence, and this is
3 mandated by Congress under the Military Commissions Act: Hearsay
4 will be admitted unless the party opposing the hearsay can
5 demonstrate by a preponderance of the evidence that the evidence is
6 unreliable under the totality of the circumstances.

7 In the defense's brief, it claims that all hearsay is
8 categorically regarded as unreliable and therefore should not be
9 admissible. Clearly, that is not Congress' intent when, in the
10 section prior to the section that detailed how hearsay evidence may
11 be regarded as inadmissible, it stated specifically that hearsay is
12 generally regarded as admissible. The position that the defense
13 posits would effectively have the Military Commission Act fighting
14 itself on that issue. That clearly is not Congress' intent.

15 The prosecution's position is that the Sixth Amendment does
16 not apply, that has been set forth in various motions to include our
17 response to this motion. I won't belabor that point on argument, but
18 would be happy to entertain any of the judge's questions specifically
19 with regard to the Sixth Amendment and the accused's rights, if any,
20 to that constitutional right.

21 The defense in its argument claimed that the Military
22 Commission Act and the Manual for Military Commissions cobbles--it is
23 a cobbling together of the rights, and it's been the prosecution's

1 position and the prosecution maintains the position clearly that the
2 rights that are afforded to this accused in this proceeding are more
3 robust than any system ever devised to prosecute enemy combatants.
4 And the defense raises an interesting point regarding missiles, and
5 this is an exact example of why hearsay evidence can generally be
6 considered to be reliable.

7 Taking the defense's position as true just for purposes of
8 this argument that the prosecution would not be able to put a witness
9 on the stand who could say that the missiles came out of Mr. Hamdan's
10 car, the evidence will show, to the extent that the interrogation
11 video is admitted as evidence, that the accused himself admitted that
12 the missiles were in the trunk of his car. So when you take that
13 admission and you use additional documents that may be considered to
14 be hearsay, you can come to the conclusion that all of the evidence
15 is generally reliable and should be admitted.

16 Now, the defense quotes *Crawford versus Washington* to say
17 that the Constitution mandates that cross-examination be the crucible
18 by which to test the truthfulness of the evidence or the reliability
19 of the evidence. And that is true that that's what the Constitution
20 mandates, but that is not in any way to suggest that there are not
21 other ways in which you can test the reliability of evidence other
22 than by cross-examination. And clearly, the defense is entitled to
23 argue in front of the members and to the military judge why the

1 evidence is not reliable and therefore should not be admitted. They
2 can also use extrinsic evidence to do that if they so choose. So
3 while *Crawford versus Washington* may have said that the Sixth
4 Amendment mandates specifically cross-examination as the crucible
5 test, there clearly are other ways to test reliability of evidence,
6 to include the rights that are afforded to the accused in this
7 proceeding.

8 Sir, at this point, unless you have some specific questions
9 about the Sixth Amendment, I would like to go to *The al Qaeda Plan*.

10 MJ [CAPT ALLRED]: I don't have any questions necessarily about
11 the Sixth Amendment, but I would like to say this about this motion,
12 the 045, the motion to exclude all hearsay.

13 I'm going to deny this motion, because it asks me in one
14 fell swoop to suppress 55 different items of evidence, many of which
15 appear to be the same kind of hearsay that would be admitted in our
16 federal and military courts under recognized exceptions to the
17 hearsay rule.

18 The way I read Rule 803, and this is the standard to which
19 I will hold the parties: Hearsay evidence may be admitted in trials
20 by military commission if the evidence would be admitted under the
21 rules of evidence applicable in trial by general courts-martial and
22 the evidence would otherwise be admissible under these rules or this
23 manual.

1 As I look at the prosecution's hearsay notice, just from
2 the description of the items that was provided, it appears that many
3 of them would qualify as business records, public records, past
4 recollection recorded, some other exception, and that they would be
5 admissible even if this were trial by general court-martial. I will
6 require the government to lay the foundation for any hearsay that
7 they want to offer, and I will expect them to have that evidence
8 admitted under a recognized exception to the hearsay rule whenever
9 possible.

10 To the extent either party relies on this separate standard
11 that appears in 803(b)(2) [sic], whatever, (b)(1) [sic] and (b)(2)
12 [sic], I want to make the decision on an item-by-item basis of
13 whether that is reliable enough and corroborated enough to be
14 admitted or not.

15 So to the extent the motion is a global motion to suppress,
16 it's denied, and I expect both parties to lay the foundation for
17 hearsay exceptions whenever possible.

18 In addition, I note that the defense has requested the same
19 leeway to offer a few items of hearsay of its own that it doesn't
20 have the ability potentially to lay the foundation for, and it seems
21 a little odd to have it both ways.

1 So, let's go to trial. I mean, I want the high quality of
2 evidence, and I will expect the government to authenticate and lay
3 hearsay exceptions for everything it can.

4 Okay. Let's talk about *The al Qaeda Plan*. As a matter of
5 fact, I don't need to hear your argument on this. What I would like
6 to do is I would like to preview the video.

7 CTC [MR. TRIVETT]: Yes, sir. In court now or in chambers?

8 MJ [CAPT ALLRED]: No. In chambers. If you will bring the me
9 the disk, I would like to defer ruling on this motion. Is this day
10 one for you guys?

11 CTC [MR. TRIVETT]: No, sir.

12 MJ [CAPT ALLRED]: Okay. Bring me the motion. Bring me the
13 video or whatever it is that contains this thing, and I would like to
14 review it before we entertain argument on the admissibility on it.

15 CTC [MR. TRIVETT]: Yes, sir, we will do. Specifically in
16 regard to all the attachments that are referenced in the motions,
17 including *The al Qaeda Plan* itself, my understanding is that was made
18 available to the judiciary.

19 MJ [CAPT ALLRED]: I have it. I read all that. I read the
20 script. Actually, I'm curious about the defense's objection under
21 Rule 403, whether it's more prejudicial than probative. I want to
22 see how graphic the images are and how fairly the images are
23 dovetailed with the text.

1 CTC [MR. TRIVETT]: Yes, sir.

2 MJ [CAPT ALLRED]: Do you want to be heard on this, Commander
3 Swift?

4 CDC [MR. SWIFT]: Just briefly, because I believe it is
5 appropriate for you to view it before.

6 We were in somewhat of a quandary in how to write an
7 objection to this, because in viewing the video I believe that some
8 parts of the videotape Your Honor will find are admissible. It's the
9 problem of *in toto*.

10 The second part is that the video is narrated by Evan
11 Kohlmann, an expert whom the government is going to call, but an
12 expert I have not yet been able to interview. The government's made
13 efforts corresponding Evan Kohlmann's schedule and mine. It's going
14 to happen down here.

15 What I suggest is that we have the cart before the horse;
16 that Mr. Kohlmann qualifies as an expert, he testifies, and then we
17 figure out whether it's cumulative or necessary, et cetera, in some
18 sort of fashion as would normally be handled. The expert's coming.
19 The expert might—I would have fewer objections, quite frankly, if the
20 expert testified, then we played as per the normal methodology in
21 court a piece of demonstrative evidence that the expert believes was
22 just this point, and it allows us to handle it point by point if we

1 need a brief one beforehand that there are particulars that will push
2 out. But we are dealing with it *in toto*. And it was----

3 MJ [CAPT ALLRED]: You are right. And I guess I feel the same
4 way about this request to pre-admit as I feel about your request to
5 suppress; it's premature. I need to see the evidence and make a
6 decision with more than what I've seen so far.

7 CDC [MR. SWIFT]: Thank you, Your Honor.

8 MJ [CAPT ALLRED]: So do you have anything else you want to
9 argue about *The al Qaeda Plan*?

10 CDC [MR. SWIFT]: Not at this time, Your Honor. At this moment,
11 I believe, after you view it in chambers and I believe that
12 appropriate motion or time to admit the plan is after Mr. Kohlmann
13 has been accepted as an expert by the court, and then we view in the
14 areas that he is going to testify in conjunction with 403. Because
15 to help do your balancing, you need to know what his testimony is as
16 to whether it's cumulative, because that balance on 403 prejudice
17 often weighs on whether it was available from another source that was
18 less prejudicial.

19 MJ [CAPT ALLRED]: Okay.

20 CTC [MR. TRIVETT]: Sir, just in quick response to that, without
21 litigating the issue, obviously you want to look at the presentation
22 first. The presentation is broken down into two parts, one of which
23 is an affidavit by Evan Kohlmann.

1 MJ [CAPT ALLRED]: I've read the affidavit.

2 CTC [MR. TRIVETT]: Okay.

3 MJ [CAPT ALLRED]: I assume it was attached to the motion.

4 CTC [MR. TRIVETT]: Yes, sir. There's a written one and then
5 there's also a digital one. The written one may be more updated than
6 the digital one. I don't know when the digital one was completed.

7 MJ [CAPT ALLRED]: Why don't you bring me the disk with all
8 seven parts of the video on it? And I will----

9 CTC [MR. TRIVETT]: My understanding is the judiciary has the
10 disk as well, sir.

11 MJ [CAPT ALLRED]: You're right. I think they do.

12 CTC [MR. TRIVETT]: I would be happy to provide it.

13 MJ [CAPT ALLRED]: The judiciary is a big organization, and I
14 haven't seen it. You're right. I think Staff Sergeant Edmonds said
15 this morning we have one. Okay. So let's do that on P-004, the
16 motion to pre-admit *The al Qaeda Plan*----

17 CTC [MR. TRIVETT]: P-003, Your Honor.

18 MJ [CAPT ALLRED]: P-003, your right.

19 Okay. What's next? I have a pretty small stack now that
20 I've gotten those two big files moved to the other side of my desk.
21 Compliance with previous rulings; suppress the administrative summary
22 of the administrative review board of Said Boujaadia; and exclude Dr.
23 Keram, are the three remaining items I have here.

1 Are we ready to take those up?

2 CDC [MR. SCHNEIDER]: Is that the three you have remaining for
3 today or for the week?

4 MJ [CAPT ALLRED]: That's all that I brought up to the bench.
5 Maybe there's something that I overlooked.

6 CDC [MR. SCHNEIDER]: I think there's self-incrimination yet to
7 be decided.

8 MJ [CAPT ALLRED]: Oh, I beg your pardon, all those. You're
9 right. All those we set aside for the end of the day. I thought we
10 had some 505 issue to resolve before we got to that.

11 TC [LCDR STONE]: We still do and I'm still waiting for the
12 declaration, although we may have some good movement on it, where we
13 may be able to deal with it. It's just a protective order. But
14 before we litigate that piece, I will have to check.

15 MJ [CAPT ALLRED]: I'm planning to take all three of those.
16 There's one to suppress because of coercive interrogation practices,
17 one to reconsider a ruling that you think I erred on at some point in
18 the past.

19 CDC [MR. SCHNEIDER]: To be clear, it's to seek reconsideration
20 in light of the Supreme Court case.

21 MJ [CAPT ALLRED]: *Boumediene*?

22 CDC [MR. SCHNEIDER]: Yes. And I would like to take the Fifth
23 if I have that right on whether or not we think you erred.

1 MJ [CAPT ALLRED]: Whether you have the right in Guantanamo Bay
2 to take the Fifth?

3 CDC [MR. SCHNEIDER]: It's up for grabs.

4 MJ [CAPT ALLRED]: Okay. I will have to think about that. Why
5 don't we set that for tomorrow morning, so just set all three of
6 those arguments for the morning so you can work your 505 matters this
7 afternoon. And decide how that impacts us.

8 Let's talk about this motion for compliance with previous
9 rulings. This really boils down to a dispute over the adequacy of
10 the government's discovery. Are you satisfied in light of the
11 government's response that any of these items you are interested in
12 have actually been provided to you?

13 CDC [MR. SWIFT]: Actually, Your Honor, we received more
14 discovery last night in the timing part. But with respect to
15 Operation Sandman, we're not satisfied that we had received it. As
16 we set out the BSCT team, our----

17 TC [LCDR STONE]: Objection. Can we deal with this piece of it
18 later when we start talking about?

19 CDC [MR. SWIFT]: And that I kind of thought that was going to
20 happen, because I think----

21 TC [LCDR STONE]: This is what we talked about in chambers.

22 MJ [CAPT ALLRED]: Okay. Well, I made notes on seven or eight
23 different items. The government responded one by one to your request

1 in their response. Most of the responses seemed like they had
2 already given it to you or it didn't exist or for some reason there
3 was nothing more I could do. Do you want to set this one aside then,
4 the whole motion, until you've worked your magic with Commander Stone
5 over there?

6 CDC [MR. SWIFT]: Yes, sir. I do.

7 MJ [CAPT ALLRED]: Okay. All right. We'll set that one aside.

8 Do you still move to exclude the testimony of Dr. Keram now
9 that you've heard it?

10 TC [LCDR STONE]: Actually, we're not sure exactly what it will
11 be at trial. If it's the same thing, then we would still move to
12 exclude her testimony. Yes, sir.

13 MJ [CAPT ALLRED]: The--the whole thing?

14 TC [LCDR STONE]: To the extent that she's going to talk about
15 coercive interrogation techniques or that he was potentially coerced,
16 we think that falls into the realm of testimony in the brief that we
17 believe is inadmissible.

18 DC [LCDR MIZER]: Your Honor, you're more than familiar with
19 court-martial practice, that we get to attack the weight of the
20 evidence should this court decide that the statements are indeed
21 admissible. And we believe that her testimony would go directly to
22 the weight of the statements that the prosecution has given you
23 earlier.

1 MJ [CAPT ALLRED]: I'm inclined to agree. I think Dr. Keram is
2 here and she has some evidence about what you just said, the weight
3 to be accorded to statements that may have been obtained with various
4 kinds of pressures or whatever. So I'm not prepared to grant this.
5 And, once again, you're asking me to exclude a whole witness when
6 only part of her testimony might be objectionable.

7 TC [LCDR STONE]: We'll object when we need to at trial.

8 MJ [CAPT ALLRED]: Object when you need. That's what I want to
9 do with all the hearsay items. The al Qaeda video, it might be a
10 little bit admissible and a little bit sustained. Okay. Well.

11 DC [LCDR MIZER]: Your Honor, I think that there's one more
12 loose end, which is the prosecution motion to suppress the
13 unclassified summary of Said Boujaadia ARB.

14 MJ [CAPT ALLRED]: That's P-008.

15 DC [LCDR MIZER]: Yes, Your Honor.

16 MJ [CAPT ALLRED]: I haven't seen your response, but I can
17 imagine what it says. You don't like the government's motion.

18 DC [LCDR MIZER]: It hasn't been filed yet, Your Honor.

19 MJ [CAPT ALLRED]: That's why I haven't seen it.

20 DC [LCDR MIZER]: We plan on doing it tomorrow. But, yes, Your
21 Honor, we do not like the government's motion. That's our position.

22 CDC [MR. SCHNEIDER]: Could we hear your version of what you
23 think our objection will be? It might be better than our own.

1 MJ [CAPT ALLRED]: Well, once again, see, this is the exact
2 example of where you want to have that expanded hearsay rule
3 available to get this document into evidence.

4 CDC [MR. SCHNEIDER]: With all due respect, we have an
5 obligation to give a timely notice if the rules of the court are
6 going to be something other than what we maintain they should be. So
7 I understand completely what you're saying, but I do not want you to
8 be under the impression that we were trying to have it both ways.

9 MJ [CAPT ALLRED]: No.

10 CDC [MR. SCHNEIDER]: If you grant the relief we request, we
11 obviously are subject to the same restriction on hearsay, and we
12 would welcome that.

13 DC [LCDR MIZER]: And, Your Honor, I would also note that I
14 believe that that document is certainly admissible under 803(6) or
15 (8) as a business record or a public document.

16 MJ [CAPT ALLRED]: That's my point exactly. Many of these items
17 you've given each other notice of are in fact hearsay exceptions.
18 And this, like many of the statement that the accused made to the FBI
19 which are recorded in the form 403s or whatever else, are potentially
20 acceptable exceptions to the hearsay rule. Okay. Well, have you
21 already written your motion?

22 DC [LCDR MIZER]: It will be filed tomorrow morning, Your Honor.
23 But, in essence, we believe that it is relevant, it's exculpatory,

1 and it is probative and it will be admissible under either of those
2 two hearsay exceptions. It is a classified document.

3 MJ [CAPT ALLRED]: I'm sorry, this is to suppress the
4 unclassified summary.

5 DC [LCDR MIZER]: Yes, Your Honor. It is based upon a
6 classified document which supports the unclassified summary. The
7 classified document has two conflicting stories in it, a five-page
8 document, I think I can say, with two conflicting stories. One story
9 supports the unclassified summary of Said Boujaadia. And we believe
10 that the government can put forth one of those stories, and we should
11 be permitted to put forth the second story.

12 MJ [CAPT ALLRED]: Why don't you argue your position on this?
13 We won't force the defense to write a motion when they basically made
14 their argument.

15 TC [LCDR STONE]: Yes, sir. Well, the underlying position—the
16 government's position is you have effectively three documents. You
17 have the underlying source document, which would be a business
18 record, classified; then you have another classified document which
19 cites it; and then you have the unclassified summary of the
20 classified document.

21 The classified document and the unclassified document, I
22 know, are in conflict with each other. Because they are in conflict
23 with each other, the summary is not the official business record; it

1 is the classified document that makes its way up the chain and which
2 decisions are made. The unclassified summary is merely a summary
3 document put forth to deal with the classified part of it.

4 So for the defense to take merely the unclassified summary
5 of that document and admit it would be--it wouldn't meet the business
6 record exception because it's not the official document that is
7 pushed up the chain and which decisions are made. And it's also,
8 then you come down to the 403 part of it, that is actually
9 prejudicial when you look at what it says in comparison with the two
10 source documents, with the official classified document which things
11 are made on, decisions are made based on, as well as the original
12 source document.

13 Now, the defense has asked for what's in the filing as WWW
14 to be unclassified. We objected to it, not that we wouldn't
15 unclassified it, but rather for them to give us the specifics of
16 which provisions that they want to do. We're prepared to sit down
17 with them and deal with that.

18 MJ [CAPT ALLRED]: This is something else I guess you can talk
19 about this afternoon.

20 I will tell you right now kind of off the cuff that I think
21 the defense is entitled to admit this document. Having looked at the
22 two classified documents you showed me the other day, it appears at
23 least one of them is kind of vague about where the missiles were. I

1 didn't maybe identify the other one. So I will look at those more
2 closely tonight; but don't file any more briefs on this, I will
3 consider it in my hands for decision. I don't intend to write an
4 opinion. I will just tell you tomorrow morning what my decision is,
5 okay?

6 DC [LCDR MIZER]: Yes, Your Honor.

7 MJ [CAPT ALLRED]: How are you, Mr. Hamdan? Is your back
8 feeling okay this afternoon?

9 ACC [MR. HAMDAN]: No.

10 MJ [CAPT ALLRED]: No. Well, it looks like we've reached the
11 point where we need to recess for the afternoon, to me. We've kind
12 of argued the motions that are ready to argue, and there's some other
13 groundwork to be done. So I guess I propose that we recess for the
14 evening and come back tomorrow morning at 9ish.

15 Oh, there was a witness flying in today. Was there not?

16 TC [LCDR STONE]: He actually flies in not quite today, sir. We
17 talked about that in, in chambers.

18 MJ [CAPT ALLRED]: So we don't have another witness to take.

19 TC [LCDR STONE]: No, sir.

20 MJ [CAPT ALLRED]: All right. I will see you tomorrow morning
21 at 9:00 then, okay? The court is in recess.

22 **[The R.M.C. 803 session recessed at 1439, 17 July 2008.]**

23

1 **[The R.M.C. 803 session was called to order at 0908, 18 July 2008.]**

2 MJ [CAPT ALLRED]: Court is called to order. All parties
3 present when we recessed are once again present.

4 Let's see. What do we have in store for this morning? We
5 were waiting for the testimony of a couple of witnesses. There was a
6 505 issue afloat yesterday. And I'm curious, you told me that both
7 of those had been resolved. Is that right?

8 TC [LCDR STONE]: Yes, sir. No witnesses will be called this
9 morning due to their inability to travel due to military
10 circumstances. And, but the prosecution chooses to go forward
11 without their testimony on the motion.

12 MJ [CAPT ALLRED]: Fair enough.

13 TC [LCDR STONE]: And as we talked, I talked to both defense as
14 well as yourself, that there will be no need for a 505(g) filing.
15 And I think that effectively puts to rest the information that the
16 government is going to put forward on the generalized suppression
17 motion. And, with one other information.

18 I did attach one statement that was provided in a 505
19 filing to yourself in June. I was under the impression that it was
20 actually part of the appellate record because it had come out of a
21 505 filing. I was told that it was not, and so I've included that
22 statement as well to the court reporter. The defense is notified of
23 it, and they're aware of the circumstances of it.

1 MJ [CAPT ALLRED]: Is it something I need to go track down and
2 read before I decide the motions? Or are you just trying to ensure
3 that the record is complete?

4 TC [LCDR STONE]: To track it down, it's in the court reporter's
5 hand right in front of you.

6 MJ [CAPT ALLRED]: Oh, an actual piece of paper. So much of
7 this stuff is electronic these days.

8 TC [LCDR STONE]: Yes, sir. And that would be marked as the
9 next appellate exhibit in order.

10 MJ [CAPT ALLRED]: This is one of the statements of the accused
11 on 29 December 2001.

12 TC [LCDR STONE]: Correct.

13 MJ [CAPT ALLRED]: Should I read this? This was associated with
14 a 505 hearing that's already water under the bridge? Or is this
15 current to the motions now pending?

16 TC [LCDR STONE]: It's relevant to the current motion. It came
17 out of the 505(g) filing, is the releasable statement that came out
18 of it.

19 MJ [CAPT ALLRED]: Okay. I will give this back to the court
20 reporter and retrieve it from her later in the day when we get ready
21 to work on that motion.

22 I guess, then, we're ready to hear argument on the
23 remaining motions. Is that where we are this morning?

1 CDC [MR. SWIFT]: Yes, Your Honor.

2 MJ [CAPT ALLRED]: Well, there are four defense counsel at the
3 defense table. Who has got the lead on this, this morning?
4 Mr. Schneider [**standing up**]?

5 CDC [MR. SCHNEIDER]: It kind of depends which motion you want
6 to have argued. But if you call the motion, I'll give you the
7 argument.

8 MJ [CAPT ALLRED]: Well, I see there are three motions asking
9 for me to suppress the statement. So I see them kind of all
10 intertwined. Why don't you make the argument in any way you want?

11 CDC [MR. SCHNEIDER]: Self-incrimination. And the third one
12 being----

13 MJ [CAPT ALLRED]: Reconsideration?

14 CDC [MR. SCHNEIDER]: Reconsideration on self-incrimination.
15 Let me address the coercion now.

16 MJ [CAPT ALLRED]: Okay. Let's do that.

17 CDC [MR. SCHNEIDER]: I will attempt, and I hope I succeed in
18 not belaboring information or even legal argument you've already
19 heard.

20 We submit that based on what Mr. Hamdan went through, as
21 demonstrated by his testimony which is largely uncontroverted and
22 what we know from records and witnesses available particularly once
23 he was transferred to the western hemisphere, that the circumstances

1 under which he was interrogated did amount legally to coercive
2 techniques, which many American court, including this one, should bar
3 the admission of such evidence.

4 An overview. We know that he was taken in custody in late
5 November 2001. We know very little about what happened in the next
6 30 days. But we learned something we didn't hear in court before
7 several days ago when Mr. Hamdan testified, and that testimony is
8 uncontroverted.

9 He is the only witness who has testified with regard to
10 that at both Takteh-Pol and what he described as the Panjshir Valley
11 where he thought he was. He talked about Bagram Air Base, where
12 there was some testimony, but nothing which really shed any light
13 based on his personal knowledge and the facts that he recited. The
14 same with Kandahar.

15 We know that, while in the presence of FBI agents, they
16 didn't torture him and coerce him. In cars, he gave them information
17 around town. He never said anything uncontroverted. The same with
18 his testimony as to what he experienced in Kandahar at the hands of
19 others who did not testify and whose actions were not observed by
20 anyone who did testify.

21 We also know what happened at Guantanamo within his
22 testimony, and I would submit we also know that the individuals who

1 testified in the last two days were not present during those times
2 that he talked about.

3 We know what the effects of what he went through were
4 through Dr. Keram's testimony. And now, it falls to you as to what
5 to do about it, if anything.

6 We submit that the statement should be barred, should be
7 prohibited, should be suppressed *in toto* based on the entire
8 experience and the totality. That is our position. But we pay
9 particular emphasis on two periods of time:

10 While he was in Afghanistan, particularly the first 30
11 days, in which everyone who was asked said it is the most critical
12 time to extract information. We know nothing, and it is not for lack
13 of asking.

14 The second period of time which we would urge the Court pay
15 special attention is the late spring, early summer of 2003, when Mr.
16 Hamdan testified regarding the--what I will call, he didn't call it
17 this--the sleep interruption experience he had, which he said
18 occurred I believe either simultaneously or proceeding his meeting
19 with Agent [REDACTED]. We don't suggest that Agent [REDACTED] was
20 responsible or even aware; I have no reason to suspect, his
21 understandable ignorance of that experience.

1 But Mr. Hamdan's testimony is uncontroverted. And this
2 Court, as you know better than I, makes its decisions based on the
3 evidence, the evidence that's in the record, not outside the record.

4 We do know that there was a behavior management plan at
5 Guantanamo which involved an attempt to enhance and exploit
6 "disorientation and disorganization", quote, in the interrogation
7 process. I'm quoting from Exhibits C and H, the standard procedures
8 that have been submitted into evidence accompanying our motion.

9 The only medical evidence is that such conditions generally
10 have an effect on people who are subjected to them, and specifically
11 did with regard to this gentleman, Mr. Hamdan.

12 Let's review the prosecution's medical evidence as to what
13 the effect was as of November 2001 and May and June 2003. We've done
14 that. There is none. We have some evidence about what the effect is
15 today or within the last time period. Probably now even--probably
16 not relevant to this determination.

17 The burden on the government, as you know, as to issues
18 raised is, has it been met? We would submit it has not. The legal
19 analysis and the--let me back up and just mention a couple of facts.

20 Mr. Hamdan testified that he was leading this entangled
21 life around the time that Mr. [REDACTED] and this interrogation and
22 sleep interruption, and he testified at length about what happened in
23 Afghanistan. He talked about having been submitted to I believe what

1 he called being questioned in a manner of torture, Your Honor, I
2 think were his words as translated.

3 We've heard to try to rebut those facts that an affidavit
4 created in 2004 for that specific purpose didn't mention it. True.
5 And, that he saw no people being beaten at Bagram, he just heard
6 about it.

7 Let me say one thing about that. It's no mystery. I know
8 it's not in evidence and I don't intend to suggest that you treat it
9 as such. But there's a documentary movie which won the academy award
10 for documentary which documented that death. But the important thing
11 for your purposes, and I mean this--well, the important thing is not,
12 did it happen, you have to make a factual finding that it occurred as
13 the movie documents. What's important is what was in Mr. Hamdan's
14 mind as he explained it to you from the witness stand under oath.
15 And that is uncontroverted, what he heard and the effect it had.

16 With regard to the legal analysis which you bring to apply
17 to those facts, we believe, as you know, that the application of law
18 in light of *Boumediene* does extend, does confer a right under the
19 Constitution, among other bases, to challenge the circumstances of
20 that interrogation. And whether it's a substantive limitation on
21 another branch of government with regard to its ability or its power
22 to enact legislation that offends the clause of the Constitution,
23 such as you ruled two days ago, or whether it's a question of

1 applying the Constitution to an individual's ability to exercise a
2 right that's conferred upon it, whether it's habeas, whether it's
3 Fifth Amendment, as we'll hear later, whether it's self-incrimination
4 such as the United States Supreme Court ruled on June 12th with
5 respect to habeas as an individual right with respect to the
6 suspension clause is a Constitutional limitation on a branch of
7 government.

8 Either way, we believe the answer is that it does confer
9 that right, and the right has been exercised and the facts support
10 the relief we seek. I expect the prosecution will tell you, again,
11 that *Boumediene* is limited to its facts. Indeed, it is. And that
12 *Boumediene* and its majority author indicated it's a unique
13 circumstance. And so he did. But the way our law works, again, as
14 you know better than I do, is that the Supreme Court and the courts
15 of appeal often restrict their holdings to facts presented and confer
16 upon you and other trial courts, and even intermediate courts of
17 appeal, not just the opportunity, but the obligation and
18 responsibility to apply the law in a way which perhaps the Supreme
19 Court has not yet specifically applied. There's nothing wrong with
20 that. There's a lot right about that. And so we ask you to do that
21 here.

22 Understand there's nothing in *Boumediene* which says, we
23 tell you not to do that. There's nothing in *Boumediene* which says,

1 don't go a bit farther than what we say. And there's 200 years of
2 history which tell you to do exactly what I suggest; to make the
3 analysis, to make the determination. And it's a right and it's an
4 obligation which doesn't end at the boundary of the continental
5 United States. It extends here, it extends down, and that's what we
6 expect and what should be done.

7 I'm also prepared to talk a little bit about in what we
8 previewed the other day as a request for relief regarding the
9 disclosure of the Sandman document late in the game. I would propose
10 to address that after we hear argument on the underlying motion.

11 MJ [CAPT ALLRED]: Fair enough. Let me ask you a question
12 before you sit down.

13 CDC [MR. SCHNEIDER]: Yes.

14 MJ [CAPT ALLRED]: I previewed or read briefly Commander Mizer's
15 affidavit and looked at the associated documents, and saw one entry
16 suggesting that Operation Sandman began on June 10th, a month after
17 the accused made his statement to Special Agent [REDACTED]. Is that
18 the right chronology, or do you think there's something else I've
19 missed?

20 CDC [MR. SCHNEIDER]: I would say that's almost right. And what
21 I mean is that the documented evidence we have indicates that it was
22 imposed--that Mr. Hamdan was a participant in the program beginning

1 that date. That doesn't mean that the program commenced that date.
2 It admittedly was a bit different than Mr. Hamdan's recollection.

3 How should you treat that? Understand this; Mr. Hamdan
4 testified before we found that entry, before we ever heard of
5 something called Operation Sandman with respect to his situation. He
6 testified from his experience and his personal knowledge and what
7 happened. And as I understand it, there's some suggestion that,
8 well, he wasn't really a participant; he just happened to be in the
9 vicinity, in the same exact cell block where Operation Sandman was
10 under way. And I would submit the evidence, based on the testimony,
11 is that the operation is under way. Even if the records produced
12 late in the game, again with no dispersion on trial counsel, by the
13 time [REDACTED] gave it to us when they got it.

14 But the evidence is that the thing was under way.
15 If you wish, you could take a look at the Inspector General report.
16 Glenn Fine, who did a major investigation, I don't know whether it
17 was 500 or 800 pages, concluding that the Operation Sandman program,
18 on page 184, involves sleep interruption, frequent cell relocations.

19 MJ [CAPT ALLRED]: Stop. Stop.

20 CDC [MR. SCHNEIDER]: So I think the evidence is there. Who's
21 come in to tell you, no, that didn't really happen; Mr. Hamdan must
22 be mistaken. Who knows better than Mr. Hamdan? And at the time he

1 told us about it, he didn't know that there was going to be a report.
2 He's just telling you what he experienced.

3 MJ [CAPT ALLRED]: Is that IG report in evidence?

4 CDC [MR. SCHNEIDER]: It's not in evidence. But I would
5 suggest, if you wish, you could take judicial notice of it.

6 MJ [CAPT ALLRED]: Okay. Well, I would have to take a look at
7 it, I suppose, to do that.

8 CDC [MR. SCHNEIDER]: A review of the FBI's involvement and
9 observations of detainee interrogations at Guantanamo Bay,
10 Afghanistan, and Iraq, Office of the Inspector General made 2008.
11 I'm looking at what's called an unclassified document. Sleep
12 deprivation is discussed on pages 182, 183, and 184. It indicates
13 that Secretary Rumsfeld approved the use of sleep adjustment on April
14 16, 2003. That's at page 183.

15 MJ [CAPT ALLRED]: Okay. Thank you.

16 CDC [MR. SCHNEIDER]: I would offer the excerpts to which I made
17 reference.

18 MJ [CAPT ALLRED]: Would you get that for me, please? Thank
19 you. I would like to have that.

20 CDC [MR. SCHNEIDER]: We have no objection to the Court, if it
21 wishes, taking a look at any other portion of that report which has
22 any relevance. That's what I was looking.

1 MJ [CAPT ALLRED]: Okay. I will give this to the court
2 reporter, and ask her to mark it as the next appellate exhibit in
3 order and I will look at those pages. Thank you.

4 Commander Stone.

5 TC [LCDR STONE]: Sir, I'm going to do a little sign posting for
6 you here. I'll first start with the law as the M.C.A. says; then
7 we'll go through each period of time in which the government seeks to
8 introduce statements; and then we'll also go through that period of
9 time in which the defense seeks to introduce statements, which is
10 real interesting. And then we'll wrap up with a few arguments with
11 regards to credibility and the like.

12 First, as we know, the Military Commission Rule of Evidence
13 talks about the standard in which the terms of the admissibility of
14 statements is, if to some degree of coercion, then you look to the
15 underlying reliability of each statement.

16 Now, the Military Commission Rule of Evidence is very
17 specific that you need to look at each statement individually and
18 what had happened with regards to each statement standing on itself.
19 The defense seems to with their suppression motion, this broad-based:
20 Everything that the accused ever said at any time, regardless of any
21 circumstance, needs to be suppressed because he didn't think--he
22 thought he might have been treated unfairly.

1 You rejected that argument first in April, and for the
2 grounds that you specifically said, I want to hear specific instances
3 and how a specific incident or allegation of coercion affects a
4 specific statement. And that's M.C.R.E. 304(b)(3), is very specific
5 with regards to the specificity of each statement. That's a
6 mouthful. And show me anywhere where they've said a statement was
7 the product of any piece of coercion.

8 Now, I can draw some lines to some of the testimony that
9 was given. And you would like to say that the statement given on
10 December 29th in Bagram might be. There's some testimony. But the
11 defense is introducing that statement, sir. They've given us hearsay
12 notice. Their intent is to produce that statement in court. But it
13 was the subject of coercion? It doesn't make any sense. It sure
14 belies the idea of coercion.

15 And then, again, that of course is based on the idea that
16 the accused said he had seen--he had seen and he witnessed at Bagram
17 people dying and people being beaten on the tarmac. And then on
18 cross-examination he said, I didn't see any of that at all; that went
19 into my records that I said happened in my federal affidavit and to
20 Dr. Keram who marked it in her notes a couple of times, and then drew
21 the specific conclusion in her affidavit of May 14th:

22 One of the most traumatic experiences for this young man
23 was when he actually witnessed the beatings and death of people at

1 Bagram. This has had a profound and personal impact on him because
2 of that life-threatening trauma, PTSD experience. He said, that
3 didn't happen. So we'll deal a little more with credibility.

4 But with regards to the statement of the Bagram period,
5 Your Honor, I mean, that's the problem with this general suppression
6 motion, is it doesn't work. It doesn't allow for legal analysis
7 required not only under the rules but common jurisprudence throughout
8 everywhere. I mean, pick them off one by one.

9 Now, let's deal with Takteh-Pol. They really didn't say
10 much, if anything, about Takteh-Pol at all. And that's because [REDACTED]
11 [REDACTED] did. Said Boujaadia did. The video, the interrogation video
12 itself is probably the single best piece of evidence which we
13 actually do incorporate in view, which I know it was put in in
14 December. Let's start with that.

15 Mr. Hamdan sitting on the ground, after being captured,
16 during hostilities by Afghan surrogates with Americans within minutes
17 of his capture, minutes of his capture--or, actually, within minutes
18 of the gunfire, which then led to [REDACTED] knowing that they were
19 there. On the scene, he took care of it. And then there were
20 Americans that watched to make sure Hamdan was taken care of.

21 Those young Special Forces men did what they're trained to
22 do, did what they were supposed to do, and in an environment where
23 Mr. Hamdan very well may have been harmed because, well, it is a war.

1 I mean, that's just sort of the reality of it, and the government by
2 no stretch of the imagination downplays the potential dangers of that
3 situation. We all know what it was. But they did what they're
4 trained to do, they did what they were supposed to do, and they did
5 it right.

6 They took him, they put him there. And when it came time,
7 when the interrogator was flown in, you watch the results. I mean,
8 there was a guy standing behind this fighter, which is how he was
9 determined there, whether you want to call him a prisoner. It
10 doesn't matter for the purposes of coercion. And, yes, they had
11 weapons, because that's the environment they were in.

12 They were seeking to elicit intelligence--none of them are
13 law enforcement personnel--interrogate him to figure out who he was,
14 and to gather intelligence for the oncoming battle of Kandahar, of
15 which he admits that he had two SA-7 missiles in his vehicle.

16 [REDACTED]: I saw the SA-7s in the second vehicle, to the
17 best of my recollection. And that's where they were pointed to me,
18 because I remember looking down at them when the hatchback was up.
19 Hatchback was up, there are missiles. Okay. And he saw them in the
20 car. Hamdan says he's driving the hatchback. Pictures of the
21 hatchback. There is some dispute with regards to the color of the
22 hatchback, whether it was a muddy silver thing or whether it was
23 white.

1 Our submission to you is that may be one of those ones that
2 the jury is going to have to figure out with regards to
3 believability, certainly, but it certainly and absolutely gets past
4 your threshold with regards to reliability to send to the jury.

5 I mean, remember, in a military commission, which is
6 probably one of the most important reasons to have military members,
7 is to have military members who in some instances will have
8 experience with regards to the type of environment in which the
9 accused was captured and battlefield intelligence was tried to have
10 been gathered, because many of those individuals will be combat
11 veterans. No one is probably more capable as a jury of warriors to
12 judge the validity of that statement with regards to the evidence
13 that's gathered around him. It is unquestionably reliable.

14 We don't believe that any extra effort of coercion was
15 applied to the accused. And, quite frankly, they really didn't put
16 on any of that either.

17 They said, look, the battlefield interrogation, you know,
18 by your enemy is coercive, and so therefore we suppress. You know,
19 you play with semantics with the word coercive in the battlefield
20 context versus the legal Fifth Amendment Miranda coercive police
21 interrogation.

22 And for Takteh-Pol, I think we all know those words,
23 really, they don't fit together in terms of the definition of your

1 law enforcement Miranda coercive police interrogation. That needs to
2 go to--the Takteh-Pol statement, the capture video needs to go to the
3 jury, and they need to evaluate. And there's certainly--if you want
4 to find that the environment in which the accused may have been--was
5 coercive within a battlefield environment, I don't think there's
6 anybody in this room, potentially anybody in the world that would say
7 that it does not lend itself to that possibility. But what you also
8 have from what you see is good men doing the right thing. And let's
9 let that go to the jury.

10 Now, let's move to Bagram. He shows up in Bagram on 28
11 December and is interrogated on 29 December, of which he says he's
12 seen all these bad things happen at Bagram, which we've already
13 talked about turns out to be not true.

14 You know, Mr. Schneider made a big deal of, well, it's not
15 that it didn't happen. It's not that Hamdan didn't see it, because
16 we know that it happened.

17 The point with regards to a coercion motion is the fact
18 that it didn't happen to Mr. Hamdan, nor did he see it, nor does that
19 fit into any realm of or possibility with regards to that statement
20 that was taken. Moreover, you know, the defense is going to
21 introduce that statement. So, the defense introduces the statement.
22 It sure belies the idea of the alleged coercion that Mr. Hamdan

1 allegedly suffered when they're going to introduce the statement
2 itself.

3 Kandahar. The accused was moved to Kandahar roughly 28
4 January. The last entry of his medical book from Bagram shows that
5 he received medicine on 27--so, roughly about 28 January I'd say is
6 when he makes the move and he's interrogated and questioned by
7 Special Agent [REDACTED] to begin on roughly the 30th of
8 January, and then moves for several interviews over the course of
9 time.

10 Looking at--remember, he had only been there when [REDACTED]
11 [REDACTED] first starts talking to him two days. No allegation of
12 anything bad befalling him in Kandahar.

13 Their pleadings talk about things that never came up on
14 evidence. For instance, this bashing his head into a pole was never
15 really introduced into evidence and so you can kind of just exclude
16 that all together. He does mention first in his affidavit that he
17 was threatened and that he was--they would put a gun on the table
18 when this tour in Kandahar took place. That was in the affidavit. I
19 mean, Mr. Hamdan, if you remember his look at myself when I was
20 cross-examining him, he kind of looked at me like I had a third eye
21 in my forehead when I suggested that there was a gun on a table, in a
22 car during the tour. He's like, you know, he doesn't remember any of

1 that. It was also what Special Agent [REDACTED] said, "I don't
2 remember any of that," because it didn't happen.

3 And if you link his--the allegation that he made in his
4 federal affidavit, which talks about the tour, he said that happened
5 on the tour. Okay? What it is, is [REDACTED]--that's the only thing
6 where you might be able to take their broad based statement and point
7 to a very specific period of time where it was essentially Special
8 Agent [REDACTED]. That's the allegation you can deal with, and you
9 can deal with under a 304 analysis. But then the analysis falls
10 apart because the facts don't support it. It doesn't support it for
11 Mr. Hamdan nor for [REDACTED]. It's just sort of one of these dead
12 maybe Manchester Manual allegations that flies off into ether. And
13 that's Kandahar. No allegations, certainly nothing credible.

14 Then we come to Guantanamo Bay. The accused has been here
15 since roughly--he left on the 28th of April, and he shows up 29th,
16 30th, maybe May 1st of 2002, and was interrogated by Special Agent
17 [REDACTED], questioned by him, of which you heard his testimony.
18 Again, rejecting the idea of this general suppression, certainly [REDACTED]
19 [REDACTED] testimony and then followed by Special Agent [REDACTED], and then
20 Special Agent [REDACTED], Special Agent [REDACTED], Special Agent [REDACTED]
21 [REDACTED], Special Agent [REDACTED], still in the first period since
22 you've taken the FBI document with regards to Guantanamo Bay and the
23 statement that's contained therein.

1 If you look at the document, what you see is any sort of--
2 well, first, Mr. Hamdan makes no claims that he was ever beaten or
3 anything that might rise to the level of coercion during any of this
4 period.

5 Effectively from May 1st through at least January of 2003,
6 there's nothing--I mean, all of those statements just sort of run
7 right through. And if you look in an historical context citing what
8 is in that FBI section, what you have is the military conducting
9 interrogations in accordance with 3452 in the Army Field Manual, and
10 that's it.

11 And you ask yourself, is there any evidence of--is Mr.
12 Hamdan being credible? He admitted, I made up some of that stuff,
13 which should eliminate his credibility with regards to allegations.

14 So the first hurdle goes away. There is no coercive nature
15 of these interrogations. The only testimony that was very, quite
16 frankly, sir, enlightening is Mr. Schneider cross-examines Special
17 Agent [REDACTED] about the idea of solitary confinement. And during
18 their 14, 18 days of questioning of Mr. Hamdan, Special Agent [REDACTED]
19 said, no, roughly on July 8th, which is two days before the interview
20 ended, by the way, he was told that Hamdan was moved to a different
21 cell. And Special Agent [REDACTED], who normally would have no access or
22 ability to deal with conditions of detention, was--he danced around
23 the word, but let's just say he was a tad bit upset. Because here

1 you have a detainee with good rapport in a professionally done
2 interview where information is being gathered the way it's supposed
3 to be done, and somebody for some reason changes the condition of his
4 confinement and Mr. Hamdan loses faith in the interview process. And
5 what does he do? He stops.

6 That's 100 percent in opposite of what the defense wants
7 you to believe; that there's this systematic desire to make him talk
8 because of things that are happening to him. Sir, when they did
9 that, he stopped talking, which shows you, what? That he was fully
10 and completely within his senses to talk and provide the information
11 and the intelligence that those individuals were looking for.

12 And what does Special Agent [REDACTED] tell you afterwards?
13 "We never really got it fully back." We got some information out of
14 him, which we were able to in, an environment that he couldn't
15 control. And as you noticed, that Special Agent [REDACTED] is extremely
16 animated and fairly a big muscular fellow, so he kind of worked to
17 make things happened and moved Hamdan out to save the interview, not
18 to force the interview. Because, as what he told you and what others
19 told you, it wouldn't and didn't work.

20 So where does that leave us? It leaves us with an
21 interview that was basically terminated early. Why? Because he
22 wasn't being coerced when he was talking.

1 Now, they did provide him a telephone call to his wife, and
2 he said that he was grateful for that and was willing to talk because
3 of that. It's not coercion in any way, shape, or form, but it is, as
4 any married person would tell you, probably important of which he
5 then was able to provide and then voluntarily chose to provide
6 information.

7 He then provides information shortly another interview.
8 Special Agent [REDACTED] comes back on August 4th, Special Agent [REDACTED]
9 who is located out of the country who is unable to be here. But,
10 again, there's no indication of any additional coercion during that
11 interview. So the FBI 302 on August 4th that is before you also
12 needs to be admitted as well.

13 Now, we move through. [REDACTED] testifies that he saw
14 him I believe on the 24th and then the 28th of August. The defense
15 made a big deal with regards to medical care, that somehow either
16 Special Agent [REDACTED] got him medical care. Well, in August of 2002
17 with the population of detainees at roughly 700, what do you want a
18 person? If they see an individual saying, I have a sore back, what
19 do you want them to do? You want to see if you can get them care?
20 You want to see if we can put some Bengay on that or something? I
21 mean, this guy looks like he is hurting. Where's the nefarious
22 nature in any of that? Nothing. None. There's no evidence that
23 [REDACTED] was the one interceded. If anything, what you get is

1 you get [REDACTED], maybe--he didn't even remember that. I mean,
2 it's speculative, but somebody from there telling whether it happened
3 on that day or a couple days before, telling the agents, supervisory
4 agent, hey, this guy that I talked to looked like he needed a little
5 medical care. Can you give him a call to see if you can get him
6 seen? I mean, I know you guys are busy, but give him a little help.
7 You know, how does that impact any coerciveness of the statement? It
8 doesn't. None. And in fact, that's what I want to see. There's no
9 systematic, boom, the FBI is--no, that's crap.

10 Then we come to a number of other statements of which you
11 have before you, where Mr. Hamdan sticks his fingers in his ears and
12 refuses to speak to someone; where Special Agent [REDACTED] came in
13 and asked him a couple of questions and he said, "It's in my file.
14 I'm tired of doing this. Go away," and terminates the interview.
15 Special Agent [REDACTED] asks him about, "Hey, we're trying to run
16 down, what can you tell me about this?" And Mr. Hamdan replies,
17 "That's a stupid question."

18 A coerced man beyond his will and ability to talk to the
19 point where he is a limp noodle requiring to provide any information
20 that anybody would get from him wouldn't dare look at the eyes of his
21 enemy, at that time who he had been held for 15 months, look him
22 square in the eye and tell him, "You are stupid," if he feared
23 anything would happen to him. Because he didn't.

1 And in fact, as you go through the statements you will see
2 about eight of those where Hamdan doesn't want to talk. Tells one of
3 them, "The only reason I gave you any information is because I wanted
4 to make that phone call that I made several months ago. And, leave
5 me alone."

6 So the pattern that you see is professional work done by
7 professional people, not subject to coercion. Again, we take
8 coercion in the article of the GC3 context within the articles of
9 war, because that's where we are. Even though some of them are law
10 enforcement agents, they're down here doing an intelligence mission.
11 But nonetheless, to take it and apply the Miranda rights standard--
12 Miranda is a uniquely crafted coercive environment for police within
13 the states, and it really doesn't apply to war. And I think what you
14 have is the defense trying to import, if not Miranda--not on this
15 motion; on the next the next one they do--into the law of war
16 context. And that doesn't work. It's not required. It's never been
17 required. The duty and due diligence of Common Article 3 with
18 regards to--and the humane treatment aspects, are met by the rules
19 within the Military Commissions Act, and you should allow them, all
20 statements, to go forward.

21 Now, the last statement that they talk about and they've
22 nefariously thrown out the idea of Operation Sandman, which shows
23 that the accused was removed to the one little block and into a block

1 on June 11th, which is a month after the last interview that they're
2 going to use, not only was he not subjected to Sandman; his
3 recollection of it is only that he had some people might come down
4 and woke him up every now and then during a period when he wasn't
5 questioned. He wasn't questioned during that time and he wasn't
6 deprived of any sleep.

7 And if you, for my purposes here and my purposes here only,
8 and I'm not trying to justify whatever that program, let's look at
9 the impact that something that happens a month after he gives an
10 interview has on that interview. You know, you ask a question
11 initially, tell me how this matters? Because it doesn't.

12 What you do have in front of you is Special Agent [REDACTED]
13 [REDACTED], who is a true national asset to this country, as is all of
14 the FBI agents here, sat down with the accused, with Special Agent
15 [REDACTED], and talks to him, offered him information--or, offered
16 him various food and water and a few other things, and built a
17 rapport with him. And we'd ask you to go back to Special Agent
18 [REDACTED]'s questioning at the jurisdictional hearing for the one fact
19 when he said, "Yeah. We got there, the accused asked me and my
20 partner, 'Hey, how is George doing?' George is doing okay." Does
21 that mean a coercive environment that requires suppression? No.

22 MJ [CAPT ALLRED]: I don't remember the question about George.
23 Is this George Bush or some other George?

1 TC [LCDR STONE]: [REDACTED]. He asked how [REDACTED] was
2 doing.

3 MJ [CAPT ALLRED]: Oh. I forgot that.

4 TC [LCDR STONE]: I've got to take you back to December. You
5 know. But what he said is the accused asked Special Agent [REDACTED]
6 and Special Agent [REDACTED], "How is [REDACTED] doing?" And if you
7 go back and read the transcript, what you will see is at that time
8 Special Agent [REDACTED] had had a child and the accused had had a child,
9 and so there appeared to be some sort of connection there and he
10 asked that. Again, not a coercive nature or environment that you
11 would otherwise expect for him to ask how somebody is doing.

12 So what you really have is a professionally run program of
13 questioning of the accused that is not coercive. I mean, the
14 prosecution says, you don't get over that hurdle first of all. If
15 you do, then you have to look at the reliability aspects of it.
16 Takteh-Pol, set aside, although you can't then go use the two
17 statements from the FBI that were taken in GTMO where the accused
18 explains part of Takteh-Pol to a certain degree, to show that that--
19 the reliability there, and that they are reliable there externally
20 amongst each other as you go down the road. There are certain things
21 that are the same. There's some of them expand greatly on
22 information, some of them not so much. But they're consistent within
23 each other and they're consistent internally within the document.

1 If you take as a whole, you have a very well-run
2 professional group of individuals asking questions to gather
3 intelligence and other information about Mr. Hamdan which meets all
4 standards. And, again, we first urge you to reject this whole idea
5 of this broad-based need to suppress anything because that's not
6 really the way rule is written. If you apply it that way, what
7 you're essentially asking the government to do is to put on its
8 entire case to you, and then we'll turn around and put on our entire
9 case to the jury. And that's not the way that it works. But there's
10 certainly an indicia of reliability, a substantial indicia of
11 reliability with regards to every statement as they were taken, and
12 we say that none of them should be suppressed. Not just the agents
13 that we called or the two that we specifically plan to introduce in
14 our case-in-chief that of the agents that weren't called. Special
15 Agent [REDACTED] would be here on island. He is an individual that
16 has other requirements and will be here when he can as the events
17 lead up to interview him, as well as the military exigencies of the
18 individuals from Takteh-Pol.

19 Do not suppress any statement, especially those from the
20 Federal Bureau of Investigations and those from Takteh-Pol. And the
21 defense is planning on introducing the one from Bagram, which doesn't
22 need to be suppressed, either, because it's based fundamentally on a
23 law and premise which the accused himself said he didn't see.

1 So I will be happy to answer any questions you would have,
2 sir.

3 MJ [CAPT ALLRED]: I had one a minute ago. I can't remember
4 what it was.

5 CDC [MR. SCHNEIDER]: No objection to taking them out of order
6 if it occurs to you after Commander Stone sits down.

7 MJ [CAPT ALLRED]: I thought you were going to say, no objection
8 to beating it out of me.

9 Okay. We've been in court for an hour. I think before we
10 turn to another motion----

11 CDC [MR. SCHNEIDER]: I apologize for interrupting. I would
12 like to do two things before we recess.

13 One is, I didn't mean to be cryptic and I won't argue the
14 two statements that relate to the areas of emphasis I described.
15 November of 2001 videotapes, based on what happened before the
16 videotapes.

17 Second is the May 2003 [REDACTED] statement. Those are the
18 two statements that relate to what I call the times of emphasis.

19 MJ [CAPT ALLRED]: Yes.

20 CDC [MR. SCHNEIDER]: The second thing I would like to do, with
21 your permission, is I need to correct something that I think I said,
22 but because I probably paid least attention to what I'm saying, I'm

1 not sure. And the easiest way to do that is for me to just read you
2 something that I wrote down when I sat down.

3 I think you were misinformed on timing. We spotted
4 Sandman while you--talking to one of my co-counsel--were out at the
5 camp Sunday while you learned about sleep interruption. We, counsel,
6 knew about Operation Sandman before Mr. Hamdan testified. Mr. Hamdan
7 did not know about the document before he testified.

8 I think I said we didn't know about it. I then wrote this.
9 So I need to correct what I think I said. Counsel did know about it
10 before the testimony. I will do that regardless of whether
11 Lieutenant Commander Stone either didn't catch it or is just being
12 exceedingly courteous and not mentioning my error.

13 MJ [CAPT ALLRED]: Well, I appreciate courtesy between counsels
14 on both sides. What I understand is the defense has known for some
15 time about the operation, perhaps from conversations with the client,
16 and got the documents last Sunday then or from press reports. I
17 don't know how you knew about it.

18 CDC [MR. SCHNEIDER]: I think we got the documents Saturday, we
19 noticed the entry on Sunday afternoon late. Simultaneously, in what
20 can only be understood as coincidence, Mr. Swift was out at the camps
21 learning about sleep interruption from our client.

22 CDC [MR. SWIFT]: Your Honor, after reading not the documents
23 that I received but reading the IG report which became available in

1 May, and I talked to my client in May, I went out and talked to him
2 particularly. Of course I couldn't talk to him--I haven't seen the
3 document, but I couldn't have talked to him about the documents that
4 we received this time because they are SECRET and I'm not permitted
5 to show them to him. So there was no discussion and that didn't
6 happen.

7 I did have the IG report, which was public, in a public
8 document, and so I went out and asked specific questions regarding
9 that, the time period that the document implicated, to ask questions
10 of my client at that time.

11 MJ [CAPT ALLRED]: Okay.

12 TC [LCDR STONE]: And if we want to clear the record as well,
13 the defense was provided the last known information about it, quite
14 frankly, sir, this morning. The more blown-out piece of it. So I
15 have got--there doesn't seem to be any issue from the prosecution's
16 point.

17 MJ [CAPT ALLRED]: Okay. I was beginning to ask whether anyone
18 needs a recess before we continue, or whether--if the next motion is
19 going to take another hour, it might be nice to take a break. If
20 it's shorter, then we can press forward.

21 CDC [MR. SCHNEIDER]: It will be shorter than an hour, but I
22 think a break would be welcomed.

23 MJ [CAPT ALLRED]: Let's stand in recess.

1 [The R.M.C. 803 session recess at 1005, 18 July 2008.]

2 [The R.M.C. 803 session was called to order at 1032, 18 July 2008.]

3 MJ [CAPT ALLRED]: Court is called to order.

4 CDC [MR. SCHNEIDER]: On the issue--if I may. On the issue of
5 what relief defense feels appropriate on the late production of
6 government, I'm not much for pounding the table; I don't intend to do
7 it this morning. Discovery rules are clear. The Court is well aware
8 of what the obligations are. There's continuing obligation for
9 discovery, to produce additional material that is relevant,
10 requested, and discoverable. That happened and, as I said, to the
11 credit of trial counsel, was produced as soon as possible after they
12 learned of it and when they came into possession of it.
13 Unfortunately, there is no doubt that it was untimely, again, not
14 their fault, but their client was responsible to get it to them to
15 give it to us. We did try to review material expeditiously. You
16 have heard what we've learned. It is relevant. We think it is
17 important.

18 MJ [CAPT ALLRED]: You're talking about the 600 pages that you
19 got last Saturday or Sunday?

20 CDC [MR. SCHNEIDER]: Exactly. I don't mean to be cryptic. And
21 the reference to Operation Sandman with Mr. Hamdan's name, which we
22 think is significant. The reference indicates some 50 days of
23 participation. And it's significant because in our discovery

1 requests we sought any information on that subject in general:
2 Interrogation protocols, interrogations by the police. But also, on
3 that specific subject in particular, the so-called BSCT team to which
4 Operation Sandman is attributed. And we were told, just as I'm sure
5 my colleagues on the other side of the aisle were told, no such
6 records. We saw how the evidence came in this morning confirming, we
7 believe, that he was a participant, consistent with his testimony and
8 informed by the existence of the document.

9 As you are well aware, the rules do permit you to grant the
10 relief which you believe is appropriate under these circumstances.
11 There's a host of remedies at your disposal, remedies that are
12 familiar to you under approximately equivalent rules of military law.

13 If you conclude that the defense has carried its burden of
14 bringing it to your attention, as I think to quote, and rule that a
15 party has failed to comply with its discovery obligations under Rule
16 701, then you're entitled to take such relief as you deem
17 appropriate.

18 What is the appropriate relief? Our view is that the
19 relief should bear some relationship to the event. We're not seeking
20 any monetary sanctions. We're not seeking any gratuitous sanction.
21 Frankly, in my practice when I'm not with you, I see way too much of
22 people litigating discovery obligations and trying to implicate

1 counsel and trying to bootstrap strategic positions based on that
2 point.

3 What I would suggest is this. And of course you're not
4 limited to what I might suggest; you might not even be impressed with
5 it. But what I would suggest is this. Under normal circumstances,
6 had that document been produced six months ago, four months ago in
7 response to your April 8, 2008 specific order confirming the
8 obligation, we would have taken some discovery, I guarantee you that.
9 And we would have found out exactly what's at the bottom of not only
10 that entry but the whole program, Mr. Hamdan's participation in it,
11 and we would have put on more evidence than we're able to today.

12 I could come in here, I could have come in here Monday when
13 we previewed the subject and said, you know what? We need, we
14 deserve, and we have to have a continuance to do that discovery. We
15 need to disrupt your trial schedule. We didn't do that. That was an
16 informed decision, because we on balance thought that that, although
17 it might be of strategic use, was not some relief that was
18 appropriate to the transgression.

19 We would have named witnesses to testify next week whose
20 names we don't even know today. We would have developed a full
21 factual record this week and next. We would have utilized it better
22 than we could in the motion to suppress for coercive interrogation.

1 The appropriate relief we would suggest is that the Court
2 under these circumstances enter an irrebuttable presumption on
3 several facts that would be relevant and would inform your ruling on
4 the motions before you. Those irrebuttable presumptions, again, not
5 bound by what I suggest; in fact, we'd invite the Court to consider
6 anything else that you deem appropriate.

7 We would suggest that you enter an irrebuttable presumption
8 that this Operation Sandman program occurred. Not a big leap, even
9 though we don't have a full record, a complete record. We would
10 suggest to you that an irrebuttable presumption that Mr. Hamdan was
11 an unwilling participant in it. And we would ask that you enter a
12 finding that any discovery on that should have been produced but was
13 not by the government and not trial counsel. And, that the use of
14 that particular interrogation technique--as I understand it, the
15 program had no other purpose than to enhance interrogation--resulted
16 in a statement that is not reliable under the rules and that would
17 inform your decision under the ruling to suppress the May 17, 2003
18 [REDACTED] statement.

19 I'm not suggesting dismissal of the charges or something
20 else extreme. I'm suggesting a remedy that we think is reasonable,
21 we think is appropriate, and we think is not punitive, and we think
22 is to which we're entitled.

23 TC [LCDR STONE]: Sir, may the government be heard?

1 MJ [CAPT ALLRED]: Certainly.

2 TC [LCDR STONE]: The defense, with respect to the finding of
3 documents, certainly the document issued its good faith due diligent
4 attempt to provide that information and provided it to them on the
5 quickest opportunity.

6 MJ [CAPT ALLRED]: When you say government.

7 TC [LCDR STONE]: The prosecution.

8 MJ [CAPT ALLRED]: Okay. I think the defense has very carefully
9 segregated your efforts from those of your clients, as they call
10 them.

11 TC [LCDR STONE]: Sure. However, there are leaps with regard
12 to: We asked for BSCT records and we were told there weren't any.
13 That's true, because there aren't any BSCT records. They were told
14 that on December 21, 2007 in their discovery request. In the first
15 response, we said there aren't any. We told them----

16 MJ [CAPT ALLRED]: Even though Special Agent [REDACTED] testified
17 yesterday that there was a BSCT team with him on May 17, there are no
18 records?

19 TC [LCDR STONE]: That is--okay. As what Special Agent [REDACTED]
20 told you is there were two behavioral science consultation units.
21 The first behavioral consultation unit was run by CITF, and a
22 separate and independent unrelated group in JTF-GTMO.

1 What you have before you on the suppression, which I would
2 ask you to look at, is there is no BSCT or CITF BSCT documents, which
3 was checked and told to the defense in December, and there are no JTF
4 GTMO behavioral science consultation records with regards to Mr.
5 Hamdan. We told that to them on the 21st of December. They asked
6 again on June 20th, and we told them that again there are no records.
7 We have now put affidavits in front of you, sir, that there are no
8 records. They do not exist. And the reason they are, is because, as
9 Special Agent [REDACTED] said, [REDACTED] came down, didn't seem--you
10 know, may or may not have been very helpful. You know, there wasn't
11 a target--the BSCT CITF program didn't designate detainees. It was
12 a, look, when you're talking with a person of Islamic heritage or
13 religion, you should do A, B, and C. You know, don't show your feet.
14 That's bad. You know, it's how to conduct an interview to get the
15 best purpose and information. That's what [REDACTED] was there. He
16 left. He provided no information because he wasn't impacting the
17 interview. That's what Special Agent [REDACTED] told him. There
18 wouldn't be any record of it.

19 Now, let's move to the JTF-GTMO, which is sort of the
20 spectering cloud that kind of looms over all of that. So what
21 Special Agent [REDACTED] testified to and what is before you from the
22 [REDACTED] affidavit is, that's what it was. It's separated, it's
23 compartmentalized, and it cannot be this specter that the defense was

1 trying to raise can't bleed over into that interview. So separated,
2 which is the first reason why suppression of that statement is
3 absolutely the wrong remedy.

4 The second piece is there is no BSCT record because Mr.
5 Hamdan was not a targeted participant in Operation Sandman. That
6 information was provided to the defense this morning; and we would
7 offer it as a sealed document to you if you would want to go down
8 this road any farther. I don't think it's necessary.

9 MJ [CAPT ALLRED]: Well, let me ask you this. During the recess
10 I was looking at the page from some document that I don't understand
11 in which, I assume now Mr. Hamdan's number is 149, and there was a
12 page that said somebody had 25 days serving out minor offenses.
13 Somebody had 20 days serving out minor offenses. And 149 Operation
14 Sandman.

15 What am I supposed to make of that? It sounds like they
16 were actually moved to a separate punishment area to serve these
17 punishments.

18 TC [LCDR STONE]: Sir, I will file the sealed document. The
19 defense has access to it, and it explains that it is--that Mr. Hamdan
20 through Operation Sandman was not the subject of sleep deprivation
21 through that program.

1 MJ [CAPT ALLRED]: So his testimony that the guards were waking
2 him up every few minutes or hours shows that they were just being
3 nasty and mean?

4 TC [LCDR STONE]: It was not a concerted----

5 MJ [CAPT ALLRED]: ----or are you denying that this happened?

6 TC [LCDR STONE]: Whether it happened or it didn't happen, I
7 don't think you could ever go back and say whether it did or it
8 didn't. I mean, his movement with regards to this whole Sandman
9 issue, first of all, takes place June 11th through July 30th. So
10 three weeks or a month before--or, three weeks and a month even after
11 the statement was taken.

12 MJ [CAPT ALLRED]: Okay. I'll tell you what. Why don't you
13 file that sealed exhibit? I would like to see it. If it turns out
14 that he was not really a participant, then that better explains why
15 there might not have been any records. And I don't know what to make
16 of this entry in the log since it's unexplained, but I would like to
17 review that before I take the issue of sanctions under consideration.

18 TC [LCDR STONE]: Sir, I think the sealed document will explain
19 it, why that is in there.

20 MJ [CAPT ALLRED]: Good. I would like that explanation.

21 TC [LCDR STONE]: And then the other piece with it is any sort
22 of suppression--I don't like the term sanction; maybe judicial remedy

1 might be a little better. Sanction has a much more caustic
2 accusation to the prosecution.

3 MJ [CAPT ALLRED]: Yeah, it does. It does. And the defense has
4 been beating the drum for a long time about discovery, and they're
5 justifiably, I think, indignant that 6 months later they get 600
6 pages the week of trial. I saw your response that some of it may
7 have already been provided to them and there may be duplicates. But
8 where was that in December? Is kind of what I'm wondering.

9 TC [LCDR STONE]: Well, all I can say is when we found and got
10 the information that there was additional stuff that may not have
11 been turned over, which came to light after a different commission
12 case had filed information about a different operation, more
13 documents, a backroom or whatever of just stuff that OMC had gone
14 through in 2006, had provided information with regards to Mr. Hamdan
15 to the defense. We notice their response on their discovery attached
16 to it, that we've gotten documents from August of 2002 through
17 December of 2003. Give us what else is out there. We had gone and
18 searched that area.

19 MJ [CAPT ALLRED]: We, meaning you?

20 TC [LCDR STONE]: We, meaning the prosecution, the Office of
21 Military Commissions.

22 MJ [CAPT ALLRED]: You?

23 TC [LCDR STONE]: Not me, personally, in 2006.

1 MJ [CAPT ALLRED]: Okay.

2 TC [LCDR STONE]: But that had been searched. Then it comes up
3 in 2008. They said, look, have you been through these? You've got
4 to come back and look again.

5 MJ [CAPT ALLRED]: Who is saying this to whom? You're asking
6 them to look again? They're asking you?

7 TC [LCDR STONE]: JTF GTMO comes to us.

8 MJ [CAPT ALLRED]: Us?

9 TC [LCDR STONE]: OMC.

10 MJ [CAPT ALLRED]: Commander Stone and company.

11 TC [LCDR STONE]: OMC.

12 MJ [CAPT ALLRED]: Okay.

13 TC [LCDR STONE]: And says, have you looked at this material?
14 This is in June of 2008. I believe that we have, because we had been
15 through that in 2006. They went, they did a thorough search. And
16 some of those documents we believe have been provided to the defense;
17 but in the abundance of caution, obviously some of them had not been.
18 Between 2006 and 2008 that pile of documents became bigger, and so in
19 the abundance of caution we did absolutely everything we could in
20 terms of turning it over. And, unfortunately, it did happen to be
21 right on the eve of trial.

1 I mean, make no--it's unfortunate that it happened in the
2 manner it did. But, nonetheless, with regards to the one document
3 that they have found, you know, it doesn't impact----

4 MJ [CAPT ALLRED]: ----the one page that's attached to the
5 commander's motion?

6 TC [LCDR STONE]: Right.

7 MJ [CAPT ALLRED]: Okay.

8 TC [LCDR STONE]: I mean, it does not impact the case
9 whatsoever, because, as you will see in the sealed document, if you
10 take a look at that. But more importantly is it happens outside of
11 the impact. It happens outside of any statement that the government
12 is going to use.

13 MJ [CAPT ALLRED]: Meaning a month after the [REDACTED] statement.

14 TC [LCDR STONE]: Correct. So to link the suggested remedy back
15 to a significantly exculpatory statement really is not the right
16 remedy. And as you will see in the declaration, it has no impact.
17 It really isn't relevant with regards to the way the government's
18 case or that the defense without put their case, because we are not
19 submitting anything past it.

20 If the Judge thinks that a remedy is necessary, I would
21 look at the idea of not allowing any statement that was taken during
22 that period of time or, more importantly, anything subsequent to
23 that. But.

1 MJ [CAPT ALLRED]: That's not much of a remedy. Is it? Since
2 there are no such statements.

3 TC [LCDR STONE]: But it also links to the period of time in
4 which this would have occurred.

5 You know, I mean, it has to link--if a remedy is
6 appropriate, but we don't believe that it is, it should link to where
7 what is affected by it. And to say, well, we found something where
8 something may have potentially happened to him in June of 2003, you
9 know, so we should get something taken care of back there in May,
10 really doesn't fit. It's not the right answer.

11 MJ [CAPT ALLRED]: What about the SOPs that the defense claimed
12 the other day they haven't received? Is there some reason for that?

13 TC [LCDR STONE]: Well, they have received the 2003 GTMO SOP.
14 They've received the 2006, 2007. And we now have just got the
15 updated 2008 SOP. I mean, they cited the SOPs in their brief.

16 MJ [CAPT ALLRED]: Well, the specific document that I think
17 Commander Mizer said the other day he had asked for and not received
18 was the one that said a certain level of offense gets this range of
19 punishments. Is that in the SOP you provided them?

20 TC [LCDR STONE]: I have gone back to the SOP and thus I am told
21 that that is in there. I have not had the opportunity to verify. I
22 just haven't had time to go through and look through the SOP. I have
23 gone and they have said that the discipline process is in it.

1 MJ [CAPT ALLRED]: Okay.

2 TC [LCDR STONE]: So I will endeavor to go back and get the new
3 one, which we'll get.

4 MJ [CAPT ALLRED]: Commander, have you looked at the 2006 SOP?
5 Do you know if that information is in fact in the documents you were
6 given?

7 DC [LCDR MIZER]: I have not had the opportunity to do that,
8 Your Honor.

9 MJ [CAPT ALLRED]: Maybe you actually have it then.

10 DC [LCDR MIZER]: Your Honor, if I could briefly address D-049,
11 I think this would be a good time to address the outstanding
12 discovery as a separate issue from what Mr. Schneider discussed.

13 MJ [CAPT ALLRED]: I didn't bring that to the bench with me
14 today. That's the motion to compel compliance with previous orders?

15 DC [LCDR MIZER]: Yes, Your Honor.

16 MJ [CAPT ALLRED]: Okay. Well, let's talk about that then.

17 DC [LCDR MIZER]: Your Honor, there is one SOP that we don't
18 have, and that's the Tiger Team SOP.

19 MJ [CAPT ALLRED]: Okay. Let me ask you, were you satisfied
20 with the government's response to everything in that motion then
21 except the Tiger Team SOP?

22 DC [LCDR MIZER]: I believe so. Yes, Your Honor.

1 MJ [CAPT ALLRED]: Okay. So this is the only outstanding
2 discovery issue?

3 DC [LCDR MIZER]: No, Your Honor. There are two other points,
4 points one and two on the discovery motion, D-049, which is contact
5 info for individuals who had custody of Mr. Hamdan between
6 approximately 1 December and 28 December.

7 MJ [CAPT ALLRED]: Of 2001.

8 DC [LCDR MIZER]: 2001.

9 TC [LCDR STONE]: And, sir, I can deal with that with regards to
10 it----

11 MJ [CAPT ALLRED]: All right. Let's let Commander Mizer make
12 his pitch here.

13 DC [LCDR MIZER]: Sir, Your Honor, there are really three
14 outstanding points with respect to D-049. It's the Tiger Team SOPs.
15 And the government correctly points out that there are six
16 interrogations that take place that would have been governed by those
17 Tiger Team SOPs, as I understand it. And the reason that we're
18 interested is that document allegedly has instructions for
19 interrogators and those involved in the conduct of the interrogations
20 to destroy their handwritten notes.

21 We now have Special Agent [REDACTED] saying that there are
22 individuals participating in interrogations of Mr. Hamdan, and there
23 are mysteriously no records for these interrogations, including this

1 what may in fact be an advanced or enhanced interrogation technique,
2 this Operation Sandman. There's no records. So we would like to
3 take a look at the Tiger Team SOP, Your Honor, and see what in fact
4 that document says. Mr. Hamdan was being interrogated regardless of
5 whether the government intends to use those documents.

6 I think more importantly, though, is the contact
7 information and the confinement records for Mr. Hamdan during that
8 approximately one-month period in December of 2001.

9 Your Honor, I have never in my life been two days before a
10 trial and had a month missing out of the chronology of my client.
11 The government has produced--on June, the government went out to San
12 Diego, and they produced apparently a statement that was taken by
13 perhaps U.S. forces on December 5th, 2001. That falls woefully short
14 of identifying the people that had Mr. Hamdan, allowing us to speak
15 to those individuals, and then producing a confinement record for
16 that period of time.

17 Now, the government did produce Witness B. I was allowed
18 to go over to Colonel Britt's office and Witness B made a phone call
19 to me. And I was allowed to discuss what happened at Takteh-Pol, and
20 Colonel Britt instructed me that I was not allowed to ask what
21 happened to Mr. Hamdan after Takteh-Pol. So something happened to
22 Mr. Hamdan during that 30-day period. He has talked about going to
23 the Panjshir Valley in front of this Court, and we would like

1 records, we would like the documents, if any, that show where Mr.
2 Hamdan went.

3 If you look at the classified, I think another declaration
4 that I made, D-018 dealing with my interview with Lieutenant Colonel
5 [REDACTED], there may be exculpatory evidence out there based
6 upon what Colonel [REDACTED] told me. There may in fact be an alternate
7 capture story in this case, Your Honor, based upon what Lieutenant
8 Colonel [REDACTED] has told me, and we need to get to the bottom of that
9 before we begin a trial next week. We need to know what happened to
10 Mr. Hamdan.

11 That should have happened December 31st, Your Honor. It
12 should have happened before April when this Court issued that order.
13 And it certainly should have happened two days before trial. And we
14 should be provided that discovery.

15 I would note, Your Honor, the pocket litter that we
16 requested has been resolved. They have complied with producing all
17 of the pocket litter, but they did so two days ago. Again, producing
18 documents, some of which we had reviewed previously, but I think some
19 of that information may have actually been helpful in the December
20 hearing when this Court was making a determination on whether or not
21 Mr. Hamdan was in fact an unlawful enemy combatant. I think there's
22 some information in there that would refute that, some of the
23 information that has been discovered since that time.

1 We just need the discovery if we're going to trial.

2 If I could just have one moment to confer with my
3 colleague.

4 Your Honor, while we do have the 2003 Delta SOP, there's a
5 classified appendix that apparently we don't have which apparently
6 governs military commission detainees. I will have to take a look at
7 those documents, Your Honor. But we would like to have the SOPs that
8 govern or governed Mr. Hamdan's interrogations and information
9 relating to his confinement.

10 MJ [CAPT ALLRED]: So those are the three items: The contact
11 information for those who had Mr. Hamdan in their custody during the
12 month of December; the Tiger Team SOP; and the classified appendix F
13 to the 2003 JTF GTMO SOP?

14 DC [LCDR MIZER]: Yes, Your Honor. And it's contact information
15 and confinement records for that period.

16 MJ [CAPT ALLRED]: Okay. Let's see what the government says.

17 TC [LCDR STONE]: With respect to number 1 and number 2, which
18 is contact information from December 1 through December 28.

19 MJ [CAPT ALLRED]: And records.

20 TC [LCDR STONE]: And records, Appellate Exhibit 111 filed in
21 December deals with that issue.

22 MJ [CAPT ALLRED]: Okay. I will review that.

1 TC [LCDR STONE]: And, I mean, as far as the government's
2 concerned, that deals with it sufficiently. It's a closed issue.
3 And this is the second time that the defense or the third time that
4 the defense has come up and said that they want to deal with that
5 piece of it. And that's, you know, done.

6 Now, with respect to the Tiger Team SOP, it is--the filing
7 stands on itself, sir. It is a document, again, that if ordered I
8 can turn it over, but it impacts--the copy started, it started in
9 January of 2003, only for military interrogators. It did not impact
10 the case whatsoever with regards to----

11 MJ [CAPT ALLRED]: Okay. In that effect, I will order you to
12 turn it over. I would like the defense to have that chance to see it
13 for themselves and satisfy themselves that that's true.

14 TC [LCDR STONE]: And with regards to if there's a classified F
15 that we can get, I'm not even going to contest that. We will--I
16 mean, I don't know.

17 MJ [CAPT ALLRED]: Well, if there's a classified F, then you can
18 get it.

19 TC [LCDR STONE]: Then we'll get it.

20 MJ [CAPT ALLRED]: So that should answer Commander Mizer's
21 request for items 2 and 3.

22 My recollection with respect to item 1 is that Appellate
23 Exhibit 111 prevented the discussion of that evidence in open court.

1 But I'm not sure that that answers the defense's request for records
2 or the chance to discuss the condition of the confinement with those
3 people. Do you remember well enough the terms of that document?

4 TC [LCDR STONE]: I believe that it did, and that's been our
5 position. I will have to re-review it.

6 MJ [CAPT ALLRED]: You guys go look at it. Will you?

7 TC [LCDR STONE]: But I believe that's our position.

8 DC [LCDR MIZER]: Your Honor, and we would take the exact
9 opposite position, as you might expect. We did review that document
10 last night, and it discusses the disclosure of information, Your
11 Honor, but not regulation of discovery.

12 MJ [CAPT ALLRED]: Are there any documents that exist? Or have
13 you been down this road.

14 TC [LCDR STONE]: We have been down----

15 MJ [CAPT ALLRED]: I suspect a battlefield kind of detention
16 doesn't create a lot of records.

17 TC [LCDR STONE]: That's correct, sir. It does not.

18 MJ [CAPT ALLRED]: So you might just say there is no such thing.

19 TC [LCDR STONE]: Right.

20 MJ [CAPT ALLRED]: If you know.

21 TC [LCDR STONE]: There are no such created records that I'm
22 aware of with regards to contemporaneously created, sort of he's here

1 and he's there and--I've not seen them. I have reviewed all kinds of
2 stuff. So I don't believe that any exist. If it's a question of----

3 MJ [CAPT ALLRED]: Okay. That's responsive then, I guess, to
4 whether there are records or not.

5 TC [LCDR STONE]: Right.

6 MJ [CAPT ALLRED]: You've looked, you've asked, and you have
7 found none.

8 TC [LCDR STONE]: Correct.

9 MJ [CAPT ALLRED]: Could you provide to the defense some names
10 and phone numbers of the people who had custody of him even if they
11 can't?

12 TC [LCDR STONE]: That is covered by AE 111, sir.

13 MJ [CAPT ALLRED]: Once again, I can't remember well enough what
14 that said.

15 TC [LCDR STONE]: And we may have to discuss this outside of the
16 presence, in an 802 or an in-camera ex parte hearing, sir.

17 MJ [CAPT ALLRED]: Okay. Well, let's set that aside for now.

18 DC [LCDR MIZER]: Your Honor, two quick points. I think
19 Lieutenant Commander Stone probably correctly stated that there are
20 no documents that he is aware of. And I think that given the
21 substance of 111, that may in fact be a true statement. I don't know
22 that--I will leave it at that in this open session, Your Honor.

1 Additionally, there is a witness that I spoke to on the
2 phone who could tell me some of these details--and I believe that his
3 name has even been utilized in one of our sessions now because he is
4 no longer operating in this environment--who could tell me, and I was
5 prevented from asking those questions, Your Honor. I would like to
6 sit back down with that witness, who is going to be called to
7 testify, and ask those questions.

8 TC [LCDR STONE]: Lieutenant Commander Mizer will have access to
9 him once he arrives on island, and he can ask questions that are not
10 covered by AE-111.

11 MJ [CAPT ALLRED]: When will he be here?

12 TC [LCDR STONE]: They arrive tomorrow. I mean, the last group
13 of people show up on the 19th, which is tomorrow.

14 MJ [CAPT ALLRED]: This particular witness will be here
15 tomorrow?

16 TC [LCDR STONE]: Yes, sir.

17 MJ [CAPT ALLRED]: Okay. Well, why don't we see what you can
18 find when you talk to this witness then.

19 DC [LCDR MIZER]: Your Honor, I have talked to the witness.

20 MJ [CAPT ALLRED]: Who told you, you couldn't ask the question?

21 DC [LCDR MIZER]: Colonel Britt, Your Honor. And so I think we
22 really are at an impasse. The government believes that I'm not
23 entitled to that discovery, and I believe that certainly we are

1 entitled to know what happened to Mr. Hamdan for a month of his life
2 while he was in U.S. custody.

3 MJ [CAPT ALLRED]: Those are the questions you wanted to ask, is
4 what happened to him during that month? How he was treated and what
5 they know about how he was treated?

6 DC [LCDR MIZER]: Yes, Your Honor.

7 TC [LCDR STONE]: I think if we sit down and discuss and let
8 Lieutenant Commander Mizer have access to the witness, he will find
9 out that it is not the time period that he expects it to be

10 MJ [CAPT ALLRED]: Okay. Well, let's do this. You give them
11 the Tiger Team SOP and you give them classified appendix F. And I
12 will let you talk with this witness, and we will revisit this
13 discovery request on Monday perhaps.

14 We still have, as I understand it, a couple of weeks before
15 the defense will begin their case. So maybe there's time to resolve
16 this and get them the evidence they need, or to determine that there
17 isn't any, before it becomes critical for them.

18 Okay. We have two more motions to argue before 12:30.

19 CDC [MR. SCHNEIDER]: We can talk about this later, but it will
20 become critical before opening statements.

21 MJ [CAPT ALLRED]: Well, there might be some remedy. I mean,
22 you may--I don't know.

1 CDC [MR. SCHNEIDER]: And on the document to which Lieutenant
2 Commander Stone makes reference, I have not read it. I know it
3 arrived as I was coming down the steps this morning. I will read it
4 during the noon hour. I will----

5 MJ [CAPT ALLRED]: Okay. Before we go any further, the
6 classified documents you offered to submit under seal with respect to
7 Operation Sandman, I will ask the court reporter to assign an
8 appellate exhibit number to that now; and when I get it, I will give
9 it back to someone responsible, like the court reporter, and she will
10 have--so give me a copy, please, that I can keep or the original or
11 whatever you want so it can be attached to the record of trial.

12 CDC [MR. SCHNEIDER]: Yes, sir.

13 MJ [CAPT ALLRED]: What will that number be? 286 will be the
14 appellate exhibit number for the document referring to Operation
15 Sandman.

16 CDC [MR. SCHNEIDER]: I shouldn't speak until I look at it, but
17 I will read it. The question is going to be whether Mr. Hamdan knew
18 about the information in it. I will talk to counsel about that, and
19 I will then think about the cross-examination I will undertake with a
20 witness who will never testify about a document not to be discussed
21 in court.

22 Let me turn to self-incrimination. I don't intend to
23 repeat the argument that was made I believe in April. Suffice it to

1 say that it is our position that law enforcement investigations began
2 in January 2002, and your ruling prior to *Boumediene* on June 6, 2008,
3 when you noted that the government concedes that there were no rights
4 advisements. I think that's undisputed. They do not contend that
5 these were not criminal investigations other than the videotapes from
6 Takteh-Pol, and I think the telling evidence that you heard this week
7 is that those who undertake the interrogations consider it
8 incriminating if and when the interviewee makes incriminating
9 statements.

10 So I think the analysis for the Court to consider is
11 whether anything in these reports can be considered incriminating.
12 And the answer to the questions, because each of the agents was asked
13 verbatim: Give us a summary of the incriminating admissions made
14 against penal interest while you talked to this person, beginning
15 January of 2002 through the last interview; that's the territory that
16 this motion covers. In fact, the government wants you to consider
17 these statements incriminating, made against penal interest when
18 made, allegedly.

19 The question of what law applied when they were taken. We
20 know what law applies today. None of these statements were made when
21 the law that applies today was in place. It hadn't even been
22 enacted. We know today that just because some right is curtailed in

1 the M.C.A., that doesn't mean it doesn't exist. That's the way
2 habeas was treated up until last month.

3 I said yesterday that I wasn't sure we were contending you
4 erred in your last ruling, but that it should be reconsidered in
5 light of *Boumediene*. I went back and looked. I think that in the
6 brief you are considering on reconsideration we also make the point
7 that, contrary to the ruling you made on June 6, we believe that the
8 UCMJ did apply to Hamdan's statements when he made them. I don't
9 want to belabor what's in the brief, but basically in a case in which
10 he was the litigant, *Hamdan versus Rumsfeld*, we believe established
11 that the UCMJ or its rights governed his interrogations for the
12 reasons set forth at page 2786 in the opinion and footnote, I believe
13 it's footnote 47. He was at the time a person detained by the United
14 States Government on leased soil, L-E-A-S-E-D, under the control of
15 the Secretary of Defense and, as such, he had those rights at the
16 time.

17 But we also know today that you need not reach that
18 conclusion that I urge you to reach in order to grant the relief
19 which we believe is appropriate, and that is, because of the decision
20 on June 12th, 6 days following the previous ruling, the ruling in
21 which this court understandably observed with perhaps some irony that
22 the result in your ruling was, quote, at odds with what the result

1 would be in any other American court. It was at odds with what would
2 obtain in the balance of American jurisprudence.

3 As I said earlier, our position is that there's nothing in
4 *Boumediene* which says those other rights besides habeas cannot be
5 conferred if the accused in a criminal proceeding does not have the
6 ability to raise a challenge. If anything, we believe it invites
7 that analysis at the lower court, and we know--we know that the
8 history, the 200-year history of our jurisprudence is just that; the
9 lower courts make decisions. Just because the Supreme Court has not
10 yet specifically addressed the precise issue, the guidance is there,
11 and we believe that the guidance on balance, fairly read, bodes in
12 favor of recognizing the right against self-incrimination, one of
13 those fundamental rights which is at the centerpiece, not peripheral,
14 of our Constitution.

15 It's important to note that the circumstances--and I
16 recognize that the *Boumediene* case places importance on the
17 circumstances and practicalities of the litigants' venue and site.
18 What's important, we believe, is that the location of Mr. Hamdan
19 today and the location of his residence, if you will, at every
20 occasion he was interrogated while a suspect in an ongoing criminal
21 investigation and detained was not Afghanistan and was not Yemen.
22 Who knows; if it was, perhaps he would have been given those rights.
23 It's not without irony.

1 But it was right here. It was on leased soil under the
2 control of the Secretary of Defense. And I think, most importantly,
3 that was no accident. That was by design. Military commissions
4 historically were designed to address circumstances of exigency, on-
5 the-battlefield justice, because there was no time, there was no
6 ability to transport somebody back to a more contemplative
7 environment.

8 And, again, it's not without irony that here we are
9 utilizing the military commission despite the fact that the accused
10 defendant was transported literally all the way around the world to
11 be here. And the question fairly can be asked, why is that? I think
12 you know why it is.

13 A typical situation for this commission I think in light of
14 *Boumediene* will look at the circumstances of the geographic location
15 as they were dictated by events, and determine what law should apply.

16 Here, it's fair to say the administration determined what
17 law should apply--or, more precisely, what law should not apply--and
18 then created the geographic circumstances by which Mr. Hamdan was
19 interrogated at this place for several years. In fact, the intention
20 was to create what somebody said was the legal equivalent of outer
21 space where no law would apply. But we know that law does apply, and
22 law is being applied.

1 The *Insular Cases* of the *Boumediene* decision speak about
2 fundamental rights. There is none more important to an individual
3 than those in the Bill of Rights, including the Fifth Amendment.

4 Remarkably, I don't have to construct a hypothetical to
5 illustrate the point of my argument. We can look to real life.
6 Let's consider this. A foreign citizen under indictment by the
7 United States for crimes to have alleged to have occurred in the war
8 on terror, interrogated by an agent of the United States acting in
9 the course of investigating a crime in which that person is a
10 suspect. We don't have to imagine that. Agent [REDACTED] shared with
11 us that very situation. And what did he do? An alien in another
12 country under those circumstances, he gave him his rights. He had
13 his rights given to him in Arabic.

14 Let's look at another situation. Again, we don't have to
15 imagine it. I don't have to hypothesize. Let's take an alien
16 relocated at the government's discretion to Guantanamo Bay Naval
17 Station. The same circumstance: A suspect in the war on terror,
18 interrogated by agents of the United States in the course of
19 investigating, at a time when people are asked to build a criminal
20 case with prosecutors in the vicinity. Your Honor, true. The
21 prosecutors who at that time, not this team, I'm sure, but others who
22 were responsible for that prosecution at that time. Not only were
23 their rights not given, but we heard, remarkably, that the agents

1 were prohibited from doing so because it was policy. Not this
2 policy, not the agency's policy, but from somewhere on high so far up
3 that he didn't even know who it was.

4 Agent [REDACTED], you heard about his testimony. You heard it
5 in the first instance. You heard him talking about it several times.
6 No doubt what he would have done if that policy didn't apply.
7 Yesterday--and when you look at citizenship and status in light of
8 the *Boumediene* guidance, you think that those factors are very
9 important. They're not just interesting, they're not just
10 remarkable, but they're relevant.

11 Yesterday, Lieutenant Commander Mizer evoked to my surprise
12 Justice Scalia, and I think he's right. Justice Scalia happened to
13 be my former law professor. He tells us that the courts do have a
14 role to play. The American courts have a responsibility in these
15 matters to undertake the analysis, once raised, and determine if the
16 constitutional protection applies. And, if so, to determine whether
17 that protection has been conferred or denied to an accused who raises
18 the challenge; and, if not, fashion an appropriate remedy. In the
19 evidentiary world, the remedy is suppression.

20 Here, we urge this American Court sitting as a commission
21 to accept that role, undertake that analysis, and determine if the
22 constitutional protection applies in light of *Boumediene*; and, if so,
23 determine whether it has been conferred or denied. About which there

1 can be no controversy: It has been denied, and it has been
2 intentional and it has been by design.

3 There's something wonderful about the American system of
4 justice, and that's--there's many things. One is that even the least
5 powerful can come before an independent court and seek relief for
6 those things that were done, quote, "at odds with our American system
7 of justice", even those who were considered by some to be guilty of
8 serious crimes. And there's something wrong, in my view, about a
9 system of interrogation that subjects a suspect in an ongoing
10 criminal investigation to a series of interruptions, interrogations,
11 and interviews over a period of years.

12 One of our federal judges in Seattle said, "You know, day-
13 to-day we deal with issues of whether someone is detained and
14 interrogated without rights for a period of minute, maybe hours."
15 Here, we've got 32 documented interrogations, one of which lasted two
16 weeks, undertaken by 21 agents of the FBI and 19 other identified law
17 enforcement investigators. We don't know how many other
18 interrogations may have occurred at times. We don't know anything
19 about it. But we do know that each of those who testified and were
20 asked said the most critical time is the early time, about which we
21 know very little.

22 And there's something we can take pride in the fact that--
23 there's something wrong with a situation where we can take pride in

1 the fact that we gave an accused Fig Newtons while interrogating him
2 30 months into this process of interrogation; yet, we see nothing
3 wrong with denying him the fundamental right under the Constitution
4 during that same interrogation.

5 And there's something you can take pride in, and that is,
6 where a fundamental right has been denied for reasons that no one has
7 yet explained to me, our courts can make it right. Our courts can
8 take an outcome that admittedly, in your words, was at odds with what
9 the balance of American jurisprudence would have required, a result
10 that, in your words, was at odds with what normally would obtain
11 under our law.

12 Our law is not some policy of some unidentified people that
13 we will never get a chance to question or even know who they are.
14 Our law is the American law. *Boumediene* indicates that it applies.
15 And we would suggest that, in this instance, that fundamental right
16 not to have self-incriminating statements introduced at a criminal
17 trial should be conferred, should be found to have been denied, and
18 should result in suppression of those statements. This Court should
19 say that right is not going to be denied in this case with this
20 accused at this time at this place.

21 MJ [CAPT ALLRED]: Mr. Schneider, let me just engage in a little
22 exchange with you, if I could. When do you think the Fifth Amendment
23 began to attach?

1 CDC [MR. SCHNEIDER]: When do I think the----

2 MJ [CAPT ALLRED]: The Fifth Amendment right to remain silent

3 attaches to someone detained on a foreign battlefield.

4 CDC [MR. SCHNEIDER]: On a foreign battlefield?

5 MJ [CAPT ALLRED]: Immediately upon capture?

6 CDC [MR. SCHNEIDER]: The precise answer to that question is,

7 not in this case. We're not seeking to suppress the statements that

8 were made at Takteh-Pol in this motion. That tells you that I don't

9 think the Fifth Amendment applied when persons who are not identified

10 interrogated Mr. Hamdan. They should be suppressed for other

11 reasons, but not Fifth Amendment self-incrimination.

12 MJ [CAPT ALLRED]: Okay.

13 CDC [MR. SCHNEIDER]: All I'm contending here is that once he's

14 a criminal suspect in a criminal investigation by law enforcement

15 officers off the battlefield, it does attach.

16 MJ [CAPT ALLRED]: Do you know when this became a criminal

17 investigation?

18 CDC [MR. SCHNEIDER]: Yes.

19 MJ [CAPT ALLRED]: When?

20 CDC [MR. SCHNEIDER]: Mind you, I don't have some statement

21 where somebody admits it. The very first statement we seek to

22 suppress, where the attendees are not military people trying to gain

23 intelligence about the battlefield. They are not intelligence people

1 trying to obtain strategic information in the war on terror. They
2 are law enforcement people. New York police department detectives
3 interviewed him at Bagram. Beginning January 30, 2002, it's law
4 enforcement. I don't think that that's controverted on the facts and
5 on the law. And my answer to your specific question is, Fifth
6 Amendment attached on January 30, 2002, at the beginning of the
7 interviews, not at the end of the interview in 2004.

8 MJ [CAPT ALLRED]: Because it was an FBI agent conducting the
9 interview?

10 CDC [MR. SCHNEIDER]: Because he was detained, a crime had been
11 committed, he was a suspect in an ongoing investigation. And none of
12 the testimony you've heard yesterday undermines that. In fact, it
13 confirms it. When do you stop an interview? When the accused makes
14 an incriminating statement.

15 Would you please recite for us in summary form the
16 incriminating admissions that this man made on January 30th, 2002?
17 Couldn't be more clear. Could you recite even more if you testified
18 at trial? You betcha. Self-incriminating statements about a crime
19 that's being investigated. It's a difficult issue.

20 MJ [CAPT ALLRED]: Well, it is a difficult issue. The other
21 point you mentioned that I would like to ask you to maybe expand upon
22 is in fact the difference between a battlefield military commission
23 and the one that's being held here. I mean, it cuts both ways. If

1 this were held on the battlefield, you guys wouldn't be here; there
2 wouldn't be discovery. It would be more of a quick, I don't know, a
3 less protected in other ways kind of a military commission. So it's
4 been removed from a battlefield to a more comfortable location, which
5 gives you a bunch of additional rights and discovery and
6 opportunities and things. But, yes, your point is well taken; we no
7 longer have the exigency of a battlefield kind of commission.

8 CDC [MR. SCHNEIDER]: You and I never would have met if he had
9 been tried in Afghanistan or if he had suffered the same fate as
10 three others who encountered the roadblock before and after.
11 Absolutely. And let me ask this, whose decision was that?

12 MJ [CAPT ALLRED]: The Government, with a big "G."

13 CDC [MR. SCHNEIDER]: Correct.

14 MJ [CAPT ALLRED]: Was it you who argued yesterday about the
15 hundreds of American service members who were executed by military
16 courts during World War II? I mean, a battlefield military
17 commission might have been that rough summary justice. I don't know;
18 I'm just talking out loud here, I guess.

19 So I don't know what to make of it. In a way you've been
20 given great advantages and additional protections by being here, and
21 in a way perhaps deprived of others.

1 CDC [MR. SCHNEIDER]: I understand that. I don't know of any
2 case authority which says that's a green light to circumvent that
3 right.

4 MJ [CAPT ALLRED]: True.

5 CDC [MR. SCHNEIDER]: When I say it's a difficult issue, let's
6 be sure we know what I'm talking about. I don't think the outcome is
7 a difficult issue; I think it's compelling. I don't think it's just
8 appropriate; I think it's compelling. What's difficult is, you think
9 about the fact that their witnesses are going to come in and recite
10 self-incriminating statements, and it affects their case. I
11 acknowledge that. That's the way it works. And that should not
12 influence you to the contrary. And that's, I think, what makes it so
13 difficult for the government. The analysis isn't that complicated.
14 The outcome, I believe, is crystal clear.

15 MJ [CAPT ALLRED]: Okay. Thank you very much. For the
16 government.

17 CTC [MR. MURPHY]: Your Honor, the government believes that the
18 current Military Commissions Act and its prohibition against any
19 rights advisement, including Article 31, saves lives and provides
20 operational commanders with the flexibility they need to defend this
21 nation. And, that the strength of our military force depends
22 absolutely on the fact that we don't conduct wars the way the local
23 police investigate crimes.

1 We all agree that if we're in a traditional civilian
2 setting and a suspect is arrested, a police officer or even a federal
3 agent will typically pull out a card and read right from it on the
4 spot. That's not the situation we have here. We're catching people
5 on the battlefield.

6 Do we really want to put in the hands of Special Forces
7 Miranda cards that are held by police officers and federal agents
8 doing normal police work in the midst of the violence of war? Does
9 that make us safer? Does that make any sense at all? It doesn't.

10 And as much as Mr. Schneider makes really an emotional
11 appeal to the Fifth Amendment, it's an appeal that's misplaced and
12 endangers all of us. If we expect to have good rapid unimpeded
13 intelligence from the enemy--not a civilian defendant, from the
14 enemy--and you want to put a hurdle in front of that process, then
15 let's issue special forces Miranda cards and have them read through
16 those Fifth Amendment rights and see just how much intelligence we're
17 going to get from our enemy. That result is not only absurd, it's
18 dangerous.

19 Now, the defense makes a distinction between statements
20 obtained on the battlefield, as they call it--and I want to address
21 in a moment what really is the battlefield--and Guantanamo Bay,
22 property leased by the United States.

1 The government argues as one of its practical factors or
2 practical aspects that we're called upon to consider in this issue
3 that the distinction is really false. And the distinction sets up a
4 dangerous choice if we are to look at this as different settings
5 requiring different rules.

6 First of all, if you accept the fact of the defense, that
7 in Guantanamo you have a different situation requiring rights
8 advisements, at complete odds with the statute that we have. But if
9 they're saying Guantanamo as opposed to what they're calling a
10 battlefield requires rights advisement, then aren't we telling our
11 military commanders, don't move the enemy? Keep them in whatever is
12 considered the battlefield?

13 The commander is going to be faced with the choice of, do I
14 keep my people here and not have to give rights warnings on the
15 battlefield? Or, do I move them to perhaps a safer location in the
16 rear, and risk losing a prosecution if we continue questioning
17 without rights warnings? We should never put our commanders in that
18 position. And it's an artificial distinction to begin with, because
19 in this war on terrorism the battlefield is not the traditional
20 battlefield in this country's prior wars.

21 On September 11th, the battlefield was New York City and it
22 was Pennsylvania and Washington. And there have been other locations

1 around the globe in which on any particular day the battlefield was
2 wherever a terrorists attack was occurring.

3 So to suggest that somehow rights advisements are
4 appropriate in Afghanistan or wherever we actually have forces
5 deployed and somehow Guantanamo Bay is not the battlefield is a false
6 distinction, and it will force our commanders to keep forces and
7 enemy forward rather than moving them in the rear for risk that they
8 could lose a prosecution that would be brought for a war crime.

9 The *Quirin* case I think really gives us a lot of guidance
10 in this regard, in which crimes or criminal prosecutions are really
11 not properly analyzed when you're dealing with the law of war, and
12 the Fifth and Sixth Amendments do not apply.

13 Our country has stated quite clearly in this system that we
14 have set up under the M.C.A. that rights warnings are not a part of
15 interviews. There are other protections on the reliability of
16 information that the court hears, but rights warnings are not one of
17 them. And, as the Court properly noted, there are additional
18 benefits that the defense does receive here that they wouldn't if we
19 were holding this trial, perhaps somewhere in Afghanistan or other
20 places. But one of the benefits they do not get is any kind of
21 rights warnings.

22 They received no relief under *Boumediene* for reasons we've
23 discussed at length in prior motions. This is a motion for

1 reconsideration. No facts have changed, and even the law has never
2 changed in this regard since post-*Boumediene*.

3 Therefore, as a matter of national security, protection of
4 the American people, and fairness to the accused in this proceeding,
5 he has many rights, but one of them that he does not have is Fifth
6 Amendment rights.

7 And, I'm happy to answer any questions that the Court may
8 have.

9 MJ [CAPT ALLRED]: Certainly. Let's see. Your expert Evan
10 Kohlmann is going to be here sometime in the next few weeks. He has
11 been qualified as an expert witness in numerous prosecutions in the
12 United States; United States versus somebody with a Middle Eastern
13 sounding name.

14 All of those people have been tried of crimes in the war on
15 terrorism, I gather, in courts where statements not preceded by
16 rights are not admissible. Why should the result be different here?

17 CTC [MR. MURPHY]: Well, in those proceedings in Federal
18 District Court, decisions have been made at the highest levels of our
19 government that those cases are to proceed in Federal District Court
20 where entirely different rules apply. In this forum, the government
21 has the obligation before it can try anyone to establish that they
22 are an alien unlawful enemy combatant.

1 The government really has the prerogative to make the
2 decision as to where to file charges and where they are appropriate,
3 and that's a traditional prerogative that the government has. It
4 doesn't mean that what we are doing is in any way wrong; it is a
5 conscious prosecutorial choice. And between the Department of
6 Justice that I'm a part of and other parts of the government, some
7 cases have been brought in Federal District Court. And now, nearly
8 20 cases have been either sworn or referred to this commission
9 process.

10 The power of the federal government allows it to elect
11 whether and where, under the rules, to bring charges. And that's
12 what's reflected here.

13 MJ [CAPT ALLRED]: Okay. Let's go to May of 2003, when Special
14 Agent [REDACTED] and [REDACTED] visited the accused here, 30-some
15 months into his period of detention, far removed from the
16 battlefield, no intelligence gathering mission at stake. Why should
17 he still be able to obtain incriminating statements from Mr. Hamdan
18 and without any warning that he was preparing a criminal case?

19 CTC [MR. MURPHY]: Your Honor, the government would actually not
20 agree with the Court that there was no intelligence mission at stake.
21 As you have seen in the 302s that have been filed and as well as the
22 testimony of Agent [REDACTED], and later in court proceedings when you

1 hear from the testimony of former FBI Agent [REDACTED], they were
2 still very much on an intelligence mission.

3 Several factors that were at play was has Mr. Hamdan told
4 us everything? That is always an issue. We should not assume that
5 he had exhausted every bit of information and that it was simply
6 pointless from an intel standpoint to conduct yet another interview.
7 The interviews with Agent [REDACTED] and Agent [REDACTED] were among the
8 most far reaching in scope, as you know. They include
9 identification----

10 MJ [CAPT ALLRED]: I have no idea what he said in any of these
11 interviews.

12 CTC [MR. MURPHY]: The 302s, particularly for [REDACTED], are in
13 the record and have been submitted, and there's extensive photograph
14 identification, there's extensive discussion of locations, all of
15 which is tremendously important to corroborate prior information and
16 potentially learn additional information.

17 Moreover, the interviews themselves are taken at JTF that
18 has a military intelligence mission as its primary mission. So I
19 think it really is artificial to say that, well, whatever intel was
20 learned is now over by the time Agents [REDACTED] and [REDACTED] arrived.
21 They're still very much in an intel mission, and could have learned
22 and in fact did learn additional details, which is scrutinized not

1 just by prosecutors preparing for the trials but by intelligence
2 officials at the time this information is released.

3 MJ [CAPT ALLRED]: All right. Well, I mean, I guess I can
4 accept your assertion that there was some additional intelligence
5 gathered, but it sounds like this was purely a criminal
6 investigation. I haven't read it yet. Was intelligence gathering
7 the primary thrust of the investigation and they just happened to
8 touch upon his criminal activity?

9 CTC [MR. MURPHY]: Their mission was intelligence. Now,
10 certainly the government is not going to deny that the agents saw
11 these admissions as potential facts that would be developed in a
12 trial. But equally important was, can we learn something that can be
13 passed on through intelligence and military channels that could aid
14 us?

15 So the mission--although the government will certainly
16 agree there was a reality these are admissions that could potentially
17 some day be used in a prosecution somewhere. The agents themselves
18 certainly were looking at potential exploitable intelligence. And I
19 think it's important to look at the concept and the structure of both
20 the FBI and the NCIS organizations since we're talking about Agents
21 [REDACTED] and [REDACTED].

22 Their mission is far broader than criminal prosecution.
23 Both agencies are instruments of national intelligence and work

1 closely with other government agencies, including the Department of
2 Defense. So they are not your local policemen who are there and
3 really would have a hard time saying that a traditional arrest of a
4 defendant and an interrogation would have intelligence value unless
5 you had some very extraordinary set of circumstances. Their mission
6 and their institutional structure is in large part intelligence
7 gathering and national defense.

8 MJ [CAPT ALLRED]: Okay. Just the fact that they belong to the
9 FBI doesn't mean that they're criminal investigators. Is that what
10 you're saying?

11 CTC [MR. MURPHY]: Absolutely. In fact, I don't know if this is
12 still true; there maybe has been some liberalization on it. But I
13 know as a reservist, myself, that FBI agents are one of those very
14 few categories of people that cannot join the military reserves.
15 There may be some liberalization on that now, but that at least used
16 to be the policy, simply because the view was they're a national
17 asset in a national emergency and we can't pull them away for other
18 duties.

19 So, Your Honor, the government believes that by agreeing
20 with the structure of the M.C.A., we're defending our ability of
21 commanders and our national leaders to get us the best intelligence
22 we need; and, that the structure of this court doesn't prohibit us
23 from putting on that same evidence in a trial.

1 MJ [CAPT ALLRED]: That's very convenient for the government.

2 Isn't it?

3 CTC [MR. MURPHY]: Well, Your Honor.

4 MJ [CAPT ALLRED]: I'm a little bit wary of this argument.

5 CTC [MR. MURPHY]: Well, Your Honor, I think it's very
6 necessary. As I said at the beginning of my argument, if we were to
7 put commanders in the position where they had to make choices early
8 on, and even after capture, is this an intel asset or is it someone
9 you can prosecute? If you put them in that bifurcated position,
10 you're putting them in a terrible position. They should not have to
11 choose, and the government should be allowed to go forward with both.
12 And there is no statute and no court ruling that bars that.

13 MJ [CAPT ALLRED]: Well, we might have one here soon. I mean, I
14 don't know that courts have addressed the issue before, to be honest
15 with you, because never before has the government attempted to
16 introduce in a criminal proceeding statements taken without rights
17 advisements so far from the battlefield and so far removed from, in
18 time, the battlefield.

19 Commander Stone.

20 TC [LCDR STONE]: If I might just add, to help Mr. Murphy as he
21 is trying to clarify what the point is.

22 When you talk about the exigency circumstance, it's both
23 internal to the interrogation going on, which is what Mr. Murphy

1 addressed, but there's also the exigent circumstance of the camp
2 itself, which is, it is intelligence gathering. And the importation
3 of rights and a criminal aspect to it has an exigent circumstance if
4 you're going to apply the *Boumediene*----

5 MJ [CAPT ALLRED]: ----That's my plan.

6 TC [LCDR STONE]: Well, I'm not so sure that you really need to
7 when you look at the *Verdugo*--it says that it's never been applied
8 out to the Fifth Amendment directly. Which, of course, has always
9 been the government's position. You have that, and there's no need
10 to beat that horse again. But if you do, the exigency circumstance
11 created of a war on terror in 2003 to stop the next attack, it's not
12 solely what happens with regards to the interrogation or questioning
13 of that specific person, but it's what is the impact of starting to
14 rewrite into an interrogation facility or an intelligence gathering
15 mission.

16 Okay. There's an exigency there that is equally, if not
17 more, important as to the bleed-over. And when you look at the
18 Common Article 3 standard and you jump back to that, that's where you
19 get the common protections that are required, and that's what's
20 consistent with the Military Commissions Act, and that's what's
21 consistent when you read *Boumediene*.

1 MJ [CAPT ALLRED]: So your position, I gather, is that because
2 the accused is an unlawful alien enemy combatant, he's really only
3 entitled to the protections of Common Article 3?

4 CTC [MR. MURPHY]: That's correct, Your Honor.

5 MJ [CAPT ALLRED]: The minimum standard, whatever basic fairness
6 that might entail.

7 CTC [MR. MURPHY]: And the protections of the M.C.A. as well.
8 And there's certainly criteria where you have to determine whether
9 coercion exists and whether--if it did exist, whether it was
10 reliable.

11 But Congress and the President could not have been clearer
12 on this point. Article 31 warnings were singled out in the M.C.A. in
13 section 948b(c)(1)(b) specifically. There was no question about the
14 intent of our legislature and our executive on this very point. And
15 they didn't time limit. They didn't say, you know, Article 31
16 warnings begin and end at any point. They said they don't begin at
17 all; and I think they did so for good policy and military reasons.

18 MJ [CAPT ALLRED]: Okay. One final question, both sides can
19 help me with this. I have been reading all the cases I can find
20 about the extraterritorial application of the Constitution. The only
21 ones I can think of where it was found to apply extraterritorially
22 are *Reed Versus Covert*, *Boumediene* with respect to *ex post facto*, and

1 a recent one called *Geren* versus, I don't know, somebody versus *Geren*
2 that involved two American citizens detained in Iraq.

3 Are there other cases that counsel for either side are
4 aware of where the Constitution has been found to apply
5 extraterritorially? Both of them, besides *Boumediene*, they've all
6 involved U.S. citizens. And what I see is a very conservative series
7 of cases that are reluctant to apply the Constitution there
8 extraterritorially. If there are any I'm missing, I would invite you
9 to remind me what they are so I can read them again.

10 CTC [MR. MURPHY]: Your Honor, standing here I can think of
11 none. And I think certainly the *Boumediene* case does a very good
12 job, the opinion does a very good job of tracing the history of this
13 issue generally.

14 MJ [CAPT ALLRED]: Okay

15 CTC [MR. MURPHY]: And cites many, many cases. I know the
16 defense relies very heavily on the *Insular Cases* and were hoping that
17 that would have a more expansive impact on final ruling, which it did
18 not. I'm unaware of any additional cases.

19 MJ [CAPT ALLRED]: Okay. Well, thanks very much. I appreciate
20 the exchange.

21 CDC [MR. SCHNEIDER]: Your Honor, are you asking if there are
22 any additional cases besides the *Insular Cases*? There are 22 *Insular*
23 *Cases*, to my knowledge.

1 MJ [CAPT ALLRED]: Well, I haven't read all of those.

2 CDC [MR. SCHNEIDER]: Okay.

3 MJ [CAPT ALLRED]: I've read a bunch. But I'm looking for cases
4 that found the Constitution to apply outside the United States that
5 I've overlooked, besides the ones that I mentioned.

6 CDC [MR. SCHNEIDER]: Yes, Your Honor. And we can perhaps
7 provide supplemental authority. There are cases that provide the
8 Constitution--the application of the Constitution, for instance, the
9 American occupied Philippines, to the colony of Puerto Rico.

10 MJ [CAPT ALLRED]: Those are all *Insular Cases*.

11 CDC [MR. SCHNEIDER]: Yes, Your Honor. That's what I'm saying.
12 I guess your question is, outside of the *Insular Cases* are there
13 cases that would apply the Constitution extraterritorially?

14 MJ [CAPT ALLRED]: Well, I'll tell you what. Just if there are
15 any cases where the Constitution wasn't found to apply
16 extraterritorially that I didn't cite or discuss in my equal
17 protection ruling, for example, I would appreciate you bringing them
18 to my attention so I can read them again and make sure I've
19 considered all the factors that the Court would want me to consider
20 in determining whether or not the Constitution--I mean, as
21 fundamental a right as it is, if it doesn't apply extraterritorially,
22 then we don't get there. So I'll be happy to accept additional
23 citations of authority.

1 CDC [MR. SCHNEIDER]: If they're already cited, we don't intend
2 to re-cite them.

3 MJ [CAPT ALLRED]: Okay.

4 CDC [MR. SCHNEIDER]: May I answer one of your other questions?

5 MJ [CAPT ALLRED]: Yes.

6 CDC [MR. SCHNEIDER]: I've often wondered whether oral argument
7 has much impact on rulings back home. I'll probably never know the
8 answer to that. But let me say this.

9 I think the answer to this motion has become a little less
10 difficult, and I say that for this reason. Go ahead and look at the
11 statements. You know, look at the [REDACTED] statement, see what was
12 going on. But equally important, take a look at what was already
13 known.

14 Consider who was in attendance, consider what their purpose
15 was. See if there was any intelligence-gathering personnel leading
16 those interviews or even in attendance, and understand that, with
17 [REDACTED], prosecutors charged with criminal prosecution, not
18 gathering military intelligence, typed up some questions.

19 Don't take my word for it. Listen to [REDACTED] last
20 December: Before I got on that plane in New York, I knew what I was
21 sent down there for; to investigate a crime in which he was accused.
22 And consider----

23 MJ [CAPT ALLRED]: That's what [REDACTED] said in December?

1 CDC [MR. SCHNEIDER]: You bet.

2 MJ [CAPT ALLRED]: Well, you can't expect me to remember
3 everything he said in December.

4 CDC [MR. SCHNEIDER]: Then may I paraphrase.

5 MJ [CAPT ALLRED]: Sure.

6 CDC [MR. SCHNEIDER]: Agent [REDACTED], you were asked on direct
7 examination whether you gave rights advisement. You said no. I'd
8 like to ask you a question. At the time you came down to Guantanamo
9 before you ever met Mr. Hamdan, was he a suspect in an ongoing
10 criminal investigation?

11 Answer: Yes.

12 And that's what the FBI does, among other things. Isn't
13 it, Agent [REDACTED], investigate crimes?

14 Yes. Among other things.

15 Question: Let me ask you this. If you'd been
16 interrogating him at some other location, would you have given him a
17 rights advisement?

18 The transcript won't reflect the pause, but you saw him
19 pause yesterday or a few days ago.

20 Answer: I would have.

21 Consider Agent [REDACTED] who I think in fairness agreed
22 with me, that when he was sent down there, it was, at least in part
23 in modesty, because he makes an excellent witness. He was sent down

1 to kind of summarize what they already knew and be prepared to
2 testify in a criminal case.

3 Let's not kid ourselves; does some intelligence information
4 sneak into those interrogations? I assume so. Is that their
5 purpose? No chance. No chance. Intelligence gathering, if it
6 sneaks into an otherwise custodial interrogation two and a half years
7 after apprehension--excuse me, 30 months? The fact that we've gotten
8 to the point where it's justified on the basis that, oh, it must have
9 been intelligence gathering, you can't touch it, you know, it's
10 beyond the law, I think that's telling. But I think that's where we
11 are.

12 MJ [CAPT ALLRED]: Thank you. Well, today I've very much
13 enjoyed your oral arguments and the exchange with counsel. This is a
14 fascinating issue. I think we have ended the formal arguments then
15 on the remaining motions. Is that right?

16 CTC [MR. MURPHY]: I think both parties wanted to address sort
17 of where we were, sir, on the HVD process.

18 MJ [CAPT ALLRED]: Okay.

19 CTC [MR. MURPHY]: And this is probably as good a time as any to
20 do that.

21 MJ [CAPT ALLRED]: Mr. Trivett, you've been hiding over there
22 all morning long.

23

1 CTC [MR. TRIVETT]: Yes, sir.

2 Sir, on 16 July the prosecution filed a supplemental
3 objection to the relevance and necessity of providing access to the
4 high-value detainees and also proposed an alternative to in-court
5 testimony. And the prosecution's position on the relevancy of the
6 witnesses is within the filing, and I don't expect to argue that any
7 further. I suspect that the military judge will make its
8 determination.

9 MJ [CAPT ALLRED]: I do. I overrule that objection.

10 CTC [MR. TRIVETT]: What's important, though, to the prosecution
11 at this point is to have an alternative to in-court testimony of
12 these HVDs, and we have proposed that at least in regard to Khalid
13 Sheikh Muhammed and Walid bin Attash.

14 Now, again, our objection, and I don't know if the military
15 judge is yet ready to rule on the other five. But specific to the
16 two that we anticipated the military judge would object to is that we
17 believe that the proper alternative is for a videotaped deposition
18 with only cleared participants with the defense counsel and the
19 prosecution. We think that's the best way to balance the interest of
20 both parties, in that the defense will have the opportunities to
21 present evidence of what these individuals may say that they consider
22 is exculpatory to the client and the prosecution is best able to
23 preserve the national security interests at stake.

1 I wanted to address a couple issues that came up in the
2 defense's proposed alternative, which is different, which requires
3 in-court testimony, albeit with some protections that we believe are
4 inadequate.

5 While there's no doubt that the defense states that they
6 had no intention to inquire into those classified areas, and we have
7 no reason to doubt anything other than what they've said, there's
8 still a legitimate concern. The concern, though, is based on
9 information that both sides will agree is in no way relevant to any
10 of the proceedings. And that's been laid out in the declaration, and
11 we need not get into the specifics of that. The videotaped
12 deposition really would rectify that concern. If we were able to
13 videotape depositions where the defense was able to direct these
14 individuals and the prosecution was able to cross them on all
15 relevant issues. In the event there was some type of inadvertent
16 disclosure, that could be handled no differently than the written
17 interrogatories were handled in regards to information that was
18 redacted. It would obviously need to be cut out of the videotape.
19 But in that way, once that happened, it could be played in open court
20 presumably, you know, depending on what they said. Which I think is
21 in the interests of everybody, to include the accused's commission
22 and certainly the prosecution.

1 The defense specifically points to the 5 June and 7 July
2 arraignments to suggest that there are ways around or lack of a
3 concern of inadvertent disclosures when the agreed-upon subject
4 matter by the defense and the prosecution does not get into those
5 areas. But they're incorrect to say that those arraignments went
6 without a hitch, because in fact, on 5 July--I'm sorry, on 5 June
7 there was an inadvertent disclosure by one of the detainees. I'm not
8 going to get into it, but it hit exactly on one of the concerns that
9 the prosecution filed. Now, that was in regard to a choice of
10 counsel election on the record, whereas the question is, do you
11 accept Commander such and such as your attorney?

12 Now, clearly and everyone--and a reasonable position on
13 this is that of course that would not in any way disclose the concern
14 about national security information, but it in fact did. And I think
15 that shows the concern that the prosecution has specifically in
16 regard to, we don't know what will come out of their mouths when they
17 are in open court. And with the logistics and requirements for
18 security, the amount of people that would be required for the
19 defense's proposition to have the proper clearances--and I also note
20 the defense's proposition was to remove the accused from the
21 courtroom. He would remain in the courtroom but he would be behind
22 the glass. But they did not propose that the rest of their uncleared
23 defense team would also be back there.

1 MJ [CAPT ALLRED]: Who is addressing this for the defense? I'm
2 sorry to interrupt you; I kind of want to a three-way dialogue here
3 rather than just argument.

4 So I gather that the videotaped deposition is
5 unsatisfactory to the defense. Is that your hard and fast bottom
6 line?

7 CDC [MR. SCHNEIDER]: Yes.

8 MJ [CAPT ALLRED]: Okay. Here are two options. I guess I only
9 have one option that I think will satisfy the interests of both
10 parties, and that is, live testimony of these witnesses in the SCIF
11 where the accused waives his right to be present and stays home that
12 day. That's a choice that the defense would have to affirmatively
13 make, because he is entitled to be here and he is entitled to hear
14 the evidence that's presented against him.

15 CDC [MR. SCHNEIDER]: May I?

16 MJ [CAPT ALLRED]: I'm not finished with my general idea.

17 I think uncleared members of the defense team might also
18 have to withdraw from that session and uncleared members of the
19 prosecution, if there are any, will have to withdraw from that
20 session. The court reporter, I think we have a cleared court
21 reporter. We have a cleared interpreter. We'd have to read the
22 members into the program. And that would give the defense the
23 benefit of the live testimony of the witnesses in a forum where

1 everyone was cleared to hear any inadvertent or unforeseen
2 disclosures of these sensitive areas.

3 Why don't you both react to that?

4 CDC [MR. SCHNEIDER]: The first reaction is I have a lot of
5 notes on this issue; I left them all upstairs.

6 MJ [CAPT ALLRED]: Well, I'm glad you left them all upstairs.

7 CDC [MR. SCHNEIDER]: So you're getting a spontaneous
8 conversation.

9 The second reaction is this. As I indicated previously, we
10 would discuss the subject of voluntary waiver and the right to be
11 present with Mr. Hamdan, but it is my understanding 100 percent that
12 he will----**[brief pause]**.

13 It's my understanding that that will occur. I'm informed
14 by co-counsel and we discussed this well before today--that there is
15 some additional communication about what you and I are talking about
16 right now which needs to occur before I think a formal inquiry from
17 the bench might be appropriate. But I am 100 percent certain that
18 that is the understanding, in the last couple of days, that that
19 waiver will occur.

20 With regard to the presence of counsel--well, I don't know
21 whether I'm permitted to be there or not. They're my witnesses in
22 the sense of I intended to ask the questions. I'm happy to be read

1 into whatever. I don't know if we can resolve that this morning, but
2 I just wanted to mention it.

3 MJ [CAPT ALLRED]: I don't, either. We will consult with the
4 security people. That might be a possibility, if you're the one who
5 has prepared to examine these witnesses.

6 CDC [MR. SCHNEIDER]: Third, just to be sure we're at least
7 understanding, where everyone in this three-way discussion may not
8 agree, we expect that there are three witnesses who would answer the
9 written--we know there are three witnesses who would answer the
10 questions, not two. We understand that the Court's inclination, when
11 last expressing any views on this, is that the ruling when made would
12 like to apply eight not two. I just want to remind everyone of that.

13 And then, last, it's a little bit like the Groundhog Day
14 movie, we've gone over this and over this and over this. Boy, oh
15 boy, do we put Mr. Hamdan in some jeopardy to ask these questions for
16 the first time in front of the members?

17 MJ [CAPT ALLRED]: I think we should be able to find a way not
18 to come to that. Who on the defense team has a TOP SECRET clearance?

19 CDC [MR. SCHNEIDER]: Lieutenant Commander Mizer and I do. All
20 three of us. Oh. And Ms. Prasow.

21 MJ [CAPT ALLRED]: Okay. Well, I don't know who gets permission
22 to be read into this program or all of those details.

1 Mr. Hamdan is over there claiming that he has a TOP SECRET
2 clearance. Well, all right. Maybe that will work, too. We'll check
3 with the security people.

4 Okay. So, yes. I think given the fact that some members
5 of the defense team are appropriately cleared, I don't know who gives
6 permission to interview these people beforehand, but I would like to
7 see that happen under some circumstances that--I mean, if necessary,
8 with a government security agent present who is not aligned with the
9 prosecution and who can put up the red flag when he wants to put up
10 the red flag.

11 Mr. Trivett, are you prepared to respond to this line of
12 discussion, or do you need to check with your people?

13 CTC [MR. TRIVETT]: Well, I think I am, sir.

14 MJ [CAPT ALLRED]: You can respond from there, if you'd like.

15 CTC [MR. TRIVETT]: Sir, clearly in regard to the clearance
16 issue, we're going to have to check. I'm not certain that Mr.
17 Schneider or Ms. Prasow's security clearance is sufficient. I mean,
18 I know that there's required a TOP SECRET/SCI. Without that SCI, and
19 it cannot be an interim TOP SECRET, it must be a full blown TOP
20 SECRET/SCI clearance. We'll need to check on that issue.

21 The prosecution's position is, like with any intelligence
22 concerns, the need to know has to be kept as small as possible and
23 it's just out of logic. If there's 100 people who know this

1 information, it's more likely that it get inadvertently disclosed
2 than if there's 50 people.

3 MJ [CAPT ALLRED]: How many members of the prosecution do you
4 see being present for this session? Just you?

5 CTC [MR. TRIVETT]: No, sir, it wouldn't be just me. There
6 would be at least one other prosecutor who may need to be detailed to
7 the case for that purpose.

8 MJ [CAPT ALLRED]: Okay. Who may need to be detailed to the
9 case?

10 CTC [MR. TRIVETT]: Who is not yet detailed. Correct.

11 MJ [CAPT ALLRED]: So Commander Stone and Mr. Murphy would stay
12 home that day, you're thinking?

13 CTC [MR. TRIVETT]: Yes, sir. That's my understanding.

14 MJ [CAPT ALLRED]: Okay. Well, all right.

15 CTC [MR. TRIVETT]: We would certainly work that issue out.

16 MJ [CAPT ALLRED]: If both sides play by the same rules, I'm
17 okay with maybe forcing the defense to choose those who really need
18 to know.

19 CTC [MR. TRIVETT]: And the prosecution's position would be,
20 because there is a detailed military defense counsel who is currently
21 cleared, that it would be the government's preference that the
22 government need not read anyone into this additional program, because
23 they're completely prepared and should be able to conduct the defense

1 with the detailed defense counsel that they have present who is
2 properly cleared. So that would be the government's position.

3 MJ [CAPT ALLRED]: Okay. Why would the government need two
4 counsel, then, on its side?

5 CTC [MR. TRIVETT]: I think that there's collateral impacts to
6 this cross-examination that is not limited to just this case; and,
7 that there are people with a different set of expertise who can
8 ensure that both cases or the series of cases are better protected in
9 regard to the information.

10 MJ [CAPT ALLRED]: Okay. Well, it looks like there's still some
11 checking that needs to go on. You're okay with the reading the
12 members into the program or giving them the ex post facto warning if
13 some inadvertent information is disclosed to them?

14 CTC [MR. TRIVETT]: Again, I would need to check with that, sir,
15 because that was not our proposal. Our proposal was to videotape the
16 deposition. So I would need to go back and--I know that there were
17 certain concerns with exactly how the defense proffered its proposal,
18 and we would still have those same concerns. Because, again,
19 depending on how many members that's an additional amount of people
20 that would need to get read on that the prosecution believes would be
21 able to see the exact same evidence, the exact same relevant evidence
22 if it were presented to them in videotaped deposition form. They
23 would hear the same questions, they would get the same answers.

1 MJ [CAPT ALLRED]: The videotaped deposition is our fallback.
2 That's clearly the least favorable for the defense. This is
3 important evidence for them, and I'm not going to force them to that
4 election unless we absolutely hit a brick wall with live testimony.
5 And we might, but you haven't told me that we have hit that brick
6 wall yet.

7 CTC [MR. TRIVETT]: Yes, sir. And I will check and see what the
8 level of clearances are.

9 MJ [CAPT ALLRED]: Now, once again, remember, the defense is not
10 intending to ask about any of this classified information. This will
11 surprise us all if something comes out

12 CTC [MR. TRIVETT]: Just as it did on 5 June, sir.

13 MJ [CAPT ALLRED]: Just as it did on 5 June, in response to a
14 very innocuous question, apparently.

15 All right. Well, I'm not ready to make any rulings today.
16 I appreciate that the parties are working towards a solution, and
17 maybe we're getting closer. This is important defense evidence, and
18 I want them to have it or the best approximation of it that they can
19 have.

20 CTC [MR. TRIVETT]: Yes, sir.

21 MJ [CAPT ALLRED]: What about the interviews? Commander Mizer,
22 for example. Okay, if Commander Mizer does the interviews, then he

1 might have to be the counsel who does the examination. But could Mr.
2 Schneider? Do you have an interim TOP SECRET clearance?

3 CDC [MR. SCHNEIDER]: Sir, I don't mean to mislead anyone. I
4 have what I understand is a TOP SECRET clearance. So I have the TS.
5 I'm told that I don't have the SI which follows TS/SCI.

6 MJ [CAPT ALLRED]: I don't know what those colors mean. You
7 can't show that to me and expect me to understand it.

8 Okay. Would you check on Mr. Schneider's clearance level?

9 CTC [MR. TRIVETT]: Yes, sir. But clearly, if it is not an SCI
10 level, then you cannot have access to the compartmented information,
11 which I----

12 MJ [CAPT ALLRED]: Okay. What does it take to get the SCI
13 clearance? If he's already TS, is it just a matter of reading him
14 into some new program?

15 CTC [MR. TRIVETT]: No, sir. My understanding of it is once you
16 get adjudicated to the SCI level requires either an additional
17 background check, or at least some type of adjudication of the
18 background check that was done. That's my understanding. I'll
19 certainly check.

20 MJ [CAPT ALLRED]: Okay, check. It looks like these are Mr.
21 Schneider's witnesses, and he would like to have the SCI and whatever
22 additional clearances he would need to examine them in the

1 commission. And until you run into a brick wall, that's the solution
2 I would like you to pursue for the defense.

3 CTC [MR. TRIVETT]: Yes, sir. And just so we're clear, the
4 prosecution did object to the pretrial access as well based on our
5 position with the deposition. Is it the military judge's ruling that
6 they do get pretrial access?

7 MJ [CAPT ALLRED]: Well, I'm not ruling that they do. I'm
8 telling you that that's what I want. I think that's fair. If you
9 come back and say that the people who control this information and
10 access to these witnesses are having a conniption fit and that it's
11 not going to happen, then I don't know that I have the authority to
12 override them. We have to maybe go to the videotaped deposition, or
13 maybe Commander Mizer will have to have access. Or maybe we can call
14 them in, have them interviewed here with all of us present, except
15 the members, and then let the defense decide whether they want to
16 redo that drill in front of the members. I don't know what it would
17 take. But it seems fair that the defense should have a chance to
18 talk to these guys before they call them as witnesses, if you can
19 make that happen.

20 CDC [MR. SCHNEIDER]: And of course there are remedies other
21 than the fallback position which you may want to consider. May I
22 speak to the brick wall for ten seconds?

23 MJ [CAPT ALLRED]: Yes.

1 CDC [MR. SCHNEIDER]: The two bricks in the brick wall are from
2 the record before you, Your Honor. The first, statements regarding
3 post-apprehension interaction with intelligence agencies; and second,
4 the opportunity for Mr. Hamdan to communicate with the witness.
5 That's the only bricks we have, sir.

6 MJ [CAPT ALLRED]: Okay. What I meant when I made reference to
7 the brick wall is the powers, whoever controls the intelligence
8 agencies or the government agencies or the Pentagon or whoever
9 controls access to these people might ultimately say, no, we are not
10 going to let these guys have an interview.

11 CDC [MR. SCHNEIDER]: I agree. And I guess what I'm doing is
12 making a mild suggestion, relatively ineffective so far, that when
13 you're told that, it should be based on an evidentiary record of some
14 sort other than just, well, object, couldn't do it.

15 MJ [CAPT ALLRED]: Well, I appreciate you making that point. I
16 have thought about calling the court security officer into the
17 courtroom, Mr. Powell, putting him on the stand, or some other person
18 who can make the record for why or if or when this access can occur.
19 I realize that you're consulting with some of these people, and maybe
20 they need to come in and talk to us about it. But just work it out,
21 if you can, on your own.

22 CTC [MR. TRIVETT]: Yes, sir.

23 MJ [CAPT ALLRED]: And we'll see if we can get there.

1 CDC [MR. SCHNEIDER]: Sir, I would like to point out that we
2 would like to have access to these witnesses as soon as possible. I
3 assume that we're going to be going to trial next week. And.

4 MJ [CAPT ALLRED]: That seems like a reasonable request, too.
5 But what's the deal? What's the deal with, some of these are
6 represented by counsel and their counsel are on the island at
7 different times. The cleared interpreter apparently is not around
8 just now but will be here the week of the defense case.

9 CDC [MR. SCHNEIDER]: There's a lot of these things in play.
10 But first things first. We're being told it's not going to happen no
11 matter who is here, no matter when they arrive. It's not going to
12 happen.

13 MJ [CAPT ALLRED]: What's not going to happen?

14 CDC [MR. SCHNEIDER]: The interview.

15 MJ [CAPT ALLRED]: I haven't heard that. I've heard that Mr.
16 Trivett is going to go back and work that.

17 CDC [MR. SCHNEIDER]: Up until today, that's what we've been
18 told.

19 MJ [CAPT ALLRED]: Okay. Well, I'm pressuring the government.
20 I haven't issued a ruling. If you come back and tell me that
21 whatever ruling I issue will be complied with, I can solve this
22 problem right now.

23 CTC [MR. TRIVETT]: Yes, sir. And I will need to consult.

1 MJ [CAPT ALLRED]: But if you come back and tell me that that's
2 not the case and the government has concerns that it's willing to
3 work around, then I think you are in the best position to work
4 through those with the defense and your security consultants.

5 CTC [MR. TRIVETT]: Yes, sir.

6 MJ [CAPT ALLRED]: Fair enough?

7 CTC [MR. TRIVETT]: Yes, sir.

8 CDC [MR. SCHNEIDER]: And the timing issue is entirely
9 practical. It's hard to say in opening statement what the evidence
10 will be when you don't know. That's the timing issue.

11 MJ [CAPT ALLRED]: Well, I don't know how to answer that, except
12 to say we're still trying to get access to some witnesses that you
13 think will be very helpful, and that may or may not happen.

14 CDC [MR. SCHNEIDER]: Okay.

15 MJ [CAPT ALLRED]: I don't know.

16 CDC [MR. SCHNEIDER]: Fair enough.

17 MJ [CAPT ALLRED]: There are a lot of players in the game here.

18 DC [LCDR MIZER]: Your Honor, just if I may have five seconds.
19 If the government is willing to allow me to conduct a deposition,
20 I've obviously been read on the program and met one of these with
21 this category of information. Certainly I should be able to have a
22 pretrial interview with these individuals. I don't think there's any

1 reason why that couldn't take place. The government hasn't certainly
2 proffered any reason.

3 MJ [CAPT ALLRED]: Is there any reason why that can't take
4 place?

5 CTC [MR. TRIVETT]: I think the situation is a little bit
6 different than Lieutenant Commander Mizer is referencing to. He had
7 met with his client. That's a completely different issue than
8 meeting with someone else.

9 MJ [CAPT ALLRED]: But what's the answer to his question? Can
10 he go interview these other people to see if they're willing to talk
11 to him?

12 CDC [MR. SCHNEIDER]: And I will stay home from the interview.

13 MJ [CAPT ALLRED]: Mr. Schneider will lay out on the beach that
14 day or something.

15 CTC [MR. TRIVETT]: Absent a court order, the group that was
16 responsible for making the determination has said that, no,
17 Lieutenant Commander Mizer cannot have access, absent a court order.

18 MJ [CAPT ALLRED]: Okay. I order then that Commander Mizer have
19 access to these witnesses.

20 CTC [MR. TRIVETT]: Yes, sir.

21 MJ [CAPT ALLRED]: Will that be complied with?

22 CTC [MR. TRIVETT]: For Commander Mizer, that will be complied
23 with.

1 MJ [CAPT ALLRED]: Okay. Well, let's start there. That gives
2 the defense an idea. He will be able to tell, some of these guys
3 might just say, "I'm not talking to you." And that will end the
4 subject with respect to them. And if Commander Mizer can do some
5 preliminary field work before we go any further down the road, that's
6 a start.

7 DC [LCDR MIZER]: Thank you, Your Honor.

8 MJ [CAPT ALLRED]: Good. Okay. Let me just talk briefly about
9 the trial schedule.

10 DC [LCDR MIZER]: Your Honor, I would point out that Ms. Prasow
11 has also been read on to this program. And would it be possible to
12 have her attend the interviews as well?

13 MJ [CAPT ALLRED]: Let's not press our luck.

14 DC [LCDR MIZER]: Aye, sir.

15 MJ [CAPT ALLRED]: Ms. Prasow is a wonderful help to your
16 defense team, but let's go in baby steps here. Can we?

17 DC [LCDR MIZER]: Yes, Your Honor.

18 MJ [CAPT ALLRED]: Somewhere, I think from the government, I
19 heard 10 to 14 days is what you expect.

20 TC [LCDR STONE]: I think that's--yes, sir. And that is a
21 little bit dependent on the admissibility issue with the al Qaeda
22 plan. But, yes.

1 MJ [CAPT ALLRED]: The al Qaeda plan is one hour and 20 minutes
2 long.

3 TC [LCDR STONE]: But if you say no, it's not admissible.

4 MJ [CAPT ALLRED]: Then we're 10.8 days.

5 TC [LCDR STONE]: No, we're talking lots of time.

6 MJ [CAPT ALLRED]: Lots more.

7 TC [LCDR STONE]: Lots more time.

8 DC [LCDR MIZER]: I think that's a threat.

9 TC [LCDR STONE]: No, it's not a threat.

10 MJ [CAPT ALLRED]: No.

11 TC [LCDR STONE]: It is a realistic possibility.

12 MJ [CAPT ALLRED]: I'll tell you what, I'm inclined to admit the
13 al Qaeda plan video, unless upon review it appears that the images
14 are graphic and emotional and appeal to something other than the
15 rational analysis of the evidence. That's the 403 objection that the
16 defense has raised, prejudice, as opposed to its probative value.
17 So, for what it's worth, I think--well, I will look at it this
18 weekend and tell you on Monday morning for sure.

19 DC [LCDR MIZER]: Yes, sir. We would ask that the court look at
20 it and then allow us just a few minutes to raise specific objections.

21 MJ [CAPT ALLRED]: To make your case? That's fair enough.

22 DC [LCDR MIZER]: And make a record, Your Honor, before you make
23 that ruling.

1 TC [LCDR STONE]: We do have the ability, to a certain degree,
2 edit issues if they come up.

3 MJ [CAPT ALLRED]: I mean, the defense objected, for example,
4 for parts one and two, and not part three, and that kind of thing.
5 So we might have a little yes and a little no. But, okay.

6 TC [LCDR STONE]: In answer to your question, assuming that's a
7 go, then probably 10 to 14 days is pretty good range for the
8 government's case.

9 MJ [CAPT ALLRED]: Is anyone interested in evening sessions or
10 Saturday sessions to shorten that estimate?

11 DC [LCDR MIZER]: Sir, we would ask that, due to some witness
12 issues----

13 MJ [CAPT ALLRED]: You can respond from your table there,
14 Commander.

15 DC [LCDR MIZER]: That we do have a very few very early in the
16 game here in the trial for us to have a couple, like on the 21st, the
17 22nd we have some operational issues with some people that we believe
18 will be here in a very short period of time.

19 MJ [CAPT ALLRED]: I will let you think about it. Maybe evening
20 sessions would be too painful. But if we're all here over the
21 weekend.

22 CDC [MR. SWIFT]: Your Honor, just a couple things. I would ask
23 that we look at, A, in Mr. Hamdan's life as he's here before and here

1 after, and the transportation et cetera, the sciatica; he wants to be
2 present, that we try and limit our sessions to six to eight hours a
3 day. If that meant that we don't go in the morning but that we start
4 at 12:00 in the afternoon and that accommodate a witness in the
5 evening, that makes sense. You know, though we look at a time period
6 so that he has adequate opportunities to recreate, adequate time to
7 sleep, adequate time for all of these things. Also, with the idea of
8 working through weekends, I will speak from experience here, sir.
9 While it may work to speed up an eight-day trial, the cumulative
10 effects slow down ultimately a long trial. And that everyone, to be
11 able to concentrate, to be able to provide information, we will have
12 ongoing issues such as it sounds like the high-value detainees may be
13 working their way through for quite some time.

14 MJ [CAPT ALLRED]: I don't need an answer now. I'm just laying
15 out some thoughts about the fact that we----

16 CDC [MR. SWIFT]: And the translators.

17 MJ [CAPT ALLRED]: Translators?

18 CDC [MR. SWIFT]: Not be scheduled.

19 MJ [CAPT ALLRED]: How long does the defense anticipate its case
20 will take?

21 CDC [MR. SWIFT]: It will depend on how many high-value
22 detainees we have. I would say that ultimately in the calling of
23 them and witnesses, I would say, based on the evidence that we have,

1 it's a fairly traditional, about half of the government's case. So
2 we're looking at another week or so of the defense case in that part.
3 It also depends on whether some of our witnesses are cumulative, in
4 other words, they're called by the government and by the defense. So
5 if they're called in the government's case, they'll go--and we have
6 everything we needed, they'll go away.

7 I think we're looking at a three-week trial, personally,
8 Your Honor.

9 MJ [CAPT ALLRED]: Okay.

10 TC [LCDR STONE]: Sir, what I would propose is that I will get
11 with the defense. Some of their witnesses have reasons that they
12 need to be off island as well for other concerns, and that we would
13 propose sort of--and we've also agreed to take many witnesses out of
14 order to the degree that they need to be taken out of order. For
15 instance, the defense has proposed and wants to do a video
16 teleconference from Turkey at some point. So there's a lot of----

17 MJ [CAPT ALLRED]: That's fine.

18 TC [LCDR STONE]: ----scheduling we need to do to make sure that
19 we can piece this whole thing together.

20 MJ [CAPT ALLRED]: Now, you're going to bring down the first
21 week's witnesses all at the same time? Or you have people coming in
22 and out every day?

1 TC [LCDR STONE]: All of our witnesses should be on island by
2 tomorrow.

3 MJ [CAPT ALLRED]: Okay. So we can start plowing through the
4 witnesses with no delay because we've run out until the next plane
5 arrives.

6 TC [LCDR STONE]: With one exception. I think one witness will
7 be coming a couple days after that. And we're going to frontload the
8 witnesses that have to leave. That's just the way it's going to work
9 out.

10 MJ [CAPT ALLRED]: How far into your case are you going to need
11 to know my ruling on the admissibility of the statements?

12 TC [LCDR STONE]: Early.

13 MJ [CAPT ALLRED]: Early in a three-week trial might mean the
14 second week. Like day one?

15 TC [LCDR STONE]: Like day one.

16 MJ [CAPT ALLRED]: Okay. I will be busy this weekend then.

17 TC [LCDR STONE]: Day one. Well. Yeah.

18 MJ [CAPT ALLRED]: Okay. You all need to be able to make your
19 opening statements, I guess, knowing what evidence you have access
20 to.

21 CTC [MR. TRIVETT]: Sir, if I can be heard on a point of
22 clarification in regard to the access and the HVD issue.

1 The prosecution in part of its objection has stated that
2 under 505 we need some particularity in regard to what may be said.
3 In regard to Khalid Sheikh Muhammed and Walid bin Attash, we accepted
4 the answers to the question and answers as that statement of
5 particularity. We have not seen this other referenced question and
6 answer. They seem to indicate there's a third.

7 MJ [CAPT ALLRED]: Well, apparently it's in Arabic.

8 DC [LCDR MIZER]: That's right, Your Honor.

9 MJ [CAPT ALLRED]: So they don't know what he's going to say,
10 either.

11 DC [LCDR MIZER]: It comes out of Abdul Hadi al Iraqi, and I'm
12 told that it's going to be flown back to the United States and
13 probably cleared within two or three weeks. So, as with the--oh,
14 Tuesday. Okay.

15 MJ [CAPT ALLRED]: Is there a cleared translator on the island
16 now that can go with you?

17 DC [LCDR MIZER]: We're trying to arrange for that, Your Honor.
18 I don't know what the status is. I spoke with my chain of command
19 two days ago about making that happen and I haven't checked back.
20 Perhaps tomorrow it will be.

21 MJ [CAPT ALLRED]: Perhaps the best way to find out what that
22 gentleman will say, rather than wait for the answers to be
23 translated, is to have the defense provide a proffer after they've

1 conducted their interview, because it will be in English and it will
2 be immediate. Okay?

3 CTC [MR. TRIVETT]: Well, sir, on a follow-up to that then.
4 It's the prosecution's position that Lieutenant Commander Mizer not
5 have access to anyone other than Khalid Sheikh Muhammed and Walid bin
6 Attash until we can go through the 505 process to see if it's even
7 necessary. It's possible that the Arabic comes back and he says I
8 don't know who you're referencing.

9 MJ [CAPT ALLRED]: Well, I'm prepared to give the prosecution
10 that latitude if they can translate this thing promptly, because if
11 it's going to take two or three weeks, the trial will be over before
12 the defense knows what the witness will say. And it's the
13 government's security mechanism that's the hurdle right now. So if
14 you want that luxury, then let's have those pages translated quickly.

15 CTC [MR. TRIVETT]: Yes, sir.

16 MJ [CAPT ALLRED]: But I don't see why that's the best answer.
17 Because if he goes to speak with the other detainees in person and
18 can give you a proffer Sunday night, potentially, that's the fastest
19 way to find out what information they might have and whether it will
20 worry the government.

21 CTC [MR. TRIVETT]: It may be the most expeditious way to find
22 that out, but it doesn't rectify our other concerns that we're giving
23 access to these individuals who do have the national security--that

1 has the national security implications in place without knowing for
2 sure that they're relevant to the case. And that's the major concern
3 to the prosecution

4 MJ [CAPT ALLRED]: Well, that's a big circular argument then.
5 You have to give access so we know whether they're going to be
6 relevant. I mean, I gave the government this structured written
7 question and answer mechanism to protect all of your interests, and
8 now we're at trial. That's a little too cumbersome to continue to do
9 it that way.

10 CTC [MR. TRIVETT]: Yes, sir.

11 MJ [CAPT ALLRED]: So what's your suggestion?

12 CTC [MR. TRIVETT]: Well, our suggestion, sir, is that the
13 access mechanism which you fashioned was the right access mechanism.
14 And to the extent that all of those individuals had come back with
15 questions and answers, then our objections would have been put--maybe
16 not at all, or similar to the ones we made for Khalid Sheikh Muhammed
17 and Walid bin Attash. But for whatever reason the defense either
18 didn't send them the questions because they believed that they had to
19 go through their attorney; or, they sent them the questions and they
20 decided not to answer. So, that was the proper way to do it and the
21 government agreed to that. But it has to be at the end that if they
22 don't give the answers or if they don't ask the questions, that we
23 can't then now just circumvent that first mechanism and give access,

1 which is what they had asked for to begin with. The mechanism was a
2 compromise on both parties, depending on what came out, and we were
3 going to adjust accordingly. Nothing came out, so the prosecution is
4 not adjusting in regard to its first position.

5 MJ [CAPT ALLRED]: Well, let me ask you this. I see what you're
6 saying. Let's assume then that the defense sends those questions,
7 the written questions, today to the remaining five witnesses who
8 haven't responded. Can you translate them and give them back to the
9 defense if they come back in a day or two?

10 CTC [MR. TRIVETT]: Sir, we can endeavor to get it done as fast
11 as possible. We can certainly talk to----

12 MJ [CAPT ALLRED]: What's the mechanism you have in place?
13 There's a courier who has to physically carry these written documents
14 somewhere to be translated?

15 CTC [MR. TRIVETT]: Yes, sir.

16 MJ [CAPT ALLRED]: And that takes three weeks for them to be
17 reviewed?

18 CTC [MR. TRIVETT]: If they're going to be translated up in the
19 United States. If they're going to be translated by someone on the
20 island, I would imagine it would happen as quickly as someone being
21 able to actually translate it. It's just a matter of getting a
22 cleared person down here to be ready to do that, and we could
23 certainly engage with the convening authority to see if that's

1 possible. I would imagine it could be done before the two to three
2 week period, but I would need to check with them. But we would
3 certainly endeavor to get it done as quickly as possible, if
4 necessary, before the trial.

5 MJ [CAPT ALLRED]: Is there a cleared interpreter on the island
6 now?

7 CTC [MR. TRIVETT]: I would have to check, sir.

8 MJ [CAPT ALLRED]: You don't know.

9 CTC [MR. TRIVETT]: I don't know.

10 MJ [CAPT ALLRED]: You don't know. Okay. Well, maybe you're
11 not going to get access this weekend, then, it sounds like.

12 DC [LCDR MIZER]: I believe that I'm going to have an
13 interpreter here tomorrow. I made that request, and I believe that
14 an interpreter will be here tomorrow, Your Honor. So I would like to
15 have access on Sunday. And if the third HVD says I don't know
16 anything, I will walk out of the room. I've got the clearance to
17 know the TOP SECRET answer, presumptively TOP SECRET answer, "I don't
18 know anything," and then I will leave and then this won't be an
19 issue.

20 But, Your Honor, we're going to begin a trial next week,
21 and we can't be waiting for answers. This individual--we made a
22 proffer. I went all the way to Yemen, spoke to one of the gentlemen
23 you saw in the photographs there yesterday. And it turned out to be

1 pretty accurate, the information that he has, about who these
2 gentlemen are and the information that they have. And I think that
3 justifies at this point, given that this individual has submitted the
4 questions, allowing me to go in and find out what he's going to say.
5 If he doesn't have relevant information or if he just wants to talk
6 about the information that the government is legitimately concerned
7 about, it's not going to be issue. I'm not going to disclose the
8 information, I'm not going to delve into that topic. But I do want
9 to talk about exculpatory information that the defense firmly
10 believes that he possesses with respect to Mr. Hamdan and information
11 that we should have by the time that we empanel these members, Your
12 Honor.

13 MJ [CAPT ALLRED]: That sounds fair to me. If there's a cleared
14 interpreter on the island who can go with Commander Mizer to talk to
15 these witnesses over the weekend, I would like him to be able to do
16 that. If you want, I will require him to submit a detailed proffer
17 based on his interviews, it won't need to be translated, and that can
18 be scoured and cleared and vetted. But it has to be done by Monday
19 so the defense can state in opening arguments what they think they're
20 going to have for trial. Is that going to be possible?

21 CTC [MR. TRIVETT]: I'm not certain, sir. We will endeavor to
22 make it happen.

1 MJ [CAPT ALLRED]: Well, one thing you can do, is how about
2 this, is often--well, it's not often used. But you could simply say,
3 we choose to reserve our opening statement until the end of the
4 government's case. All right. You don't like that.

5 CDC [MR. SCHNEIDER]: It's not often used for a very good
6 reason, actually. It won't be employed this time.

7 Let there be no mistake, the written questions and answers,
8 that was not an agreement by the parties and that's not a compromise
9 to which the government has ceded. Those of us who were present in
10 December, January, February, April, and June know that the government
11 was, quote, "inalterably opposed" to that, and you ordered it over
12 the objection.

13 MJ [CAPT ALLRED]: I remember it that way, too. But then the
14 government went along with it, so I guess they agreed in the end.

15 CDC [MR. SCHNEIDER]: They didn't appeal.

16 MJ [CAPT ALLRED]: They were kicking their feet, didn't they,
17 reminding me that I had done this over their objection. I think they
18 still have strong bad feelings about it.

19 Okay. I think we've come to the point where the government
20 needs to move. We've given you as much deference as we can to your
21 concerns about security; although, I will give you one more option.
22 If these security concerns are overriding, I will continue the trial.
23 You can send all your witnesses home, and we will come back in two or

1 three months when you've had to do what the process requires. And
2 that's a decision the government can make. It will cost an awful lot
3 of money, and we'll delay the trial and make Commander Stone cranky
4 for a few more months. But that option is always out there for you.

5 CTC [MR. TRIVETT]: Yes, sir.

6 MJ [CAPT ALLRED]: So I'm only pushing you because you're
7 pushing me. You want the trial to start on Monday, so get on it.
8 All right? We've got to have these problems resolved, or we'll have
9 to continue the trial. And either option is okay with me. You're
10 the guardians of the nation's classified information and also the
11 guardians of the checkbook. And so it's the guardians guarding the
12 guardians, and make your election and we'll respect it.

13 So I guess that's the way it will have to shake out. If
14 the process just can't move fast enough, then a continuance might be
15 the only--although the members I think are flying tomorrow. Okay.
16 So, figure out what you can. I don't know who you have to talk to
17 and who makes the decisions, but if you want the case to start on
18 Monday, you're going to have to work nights or weekends or something.
19 Okay. Is that fair enough?

20 I need from both parties the list of the witnesses you
21 intend to call. I need group voir dire questions you would like me
22 to ask. What I want to do, the members will be in the member box
23 there identified with a number or something. So you could say, juror

1 number one, if you want to direct a question to any particular
2 member. And I will ask the group voir dire questions; if you want
3 individual voir dire after that, I will ask you to identify for me
4 something from the questionnaire or some answer from the group voir
5 dire that warrants further investigation. And we will start on
6 Monday morning. I will work through the weekend and resolve the
7 admissibility of the various statements before that. I think I will
8 have to put out the conditions of confinement motion to sometime when
9 I get around to that. And the sanctions issue might have to slide.
10 I can't remember what else exactly is pending. I will be here all
11 day tomorrow.

12 We can hold an 803 session, 802. We can come on the record
13 if we need to come on the record. And the same is true for Sunday
14 afternoon.

15 CTC [MR. TRIVETT]: Sir, just had a question to clarify the
16 military judge's ruling in regard to access for Lieutenant Commander
17 Mizer. Is it in regard to Khalid Sheikh Muhammed, Walid bin Attash,
18 and now Abdul Hadi Al Iraqi? Because those are the three people that
19 have answered the questions.

20 MJ [CAPT ALLRED]: No. It's to everyone. They've made the best
21 proffer they can possibly make given the security barriers to their
22 meeting these witnesses. And since he's cleared and read in and

1 vetted, I think we can trust him to talk to these people and protect
2 whatever they might disclose.

3 CTC [MR. TRIVETT]: Yes, sir.

4 MJ [CAPT ALLRED]: And if you want to have a security agent
5 there who, like Mr. Sorge, some government intermediary who will not
6 be aligned with the prosecution, you can do that as well.

7 CTC [MR. TRIVETT]: Roger that, sir.

8 MJ [CAPT ALLRED]: Okay.

9 CDC [MR. SWIFT]: I was going to provide our witness list and
10 some more proposed instructions. We would like, again, in advance of
11 trial, if possible, either to have a ruling or to start to decide
12 what instructions are going to be given, because we'd like to
13 reference them to the extent possible in the opening statement.

14 Now, some instructions are contingent upon proof. But some
15 instructions, like the beginning of the war, we know all know it's
16 going to have to be proved. It's not contingent proof. And there
17 are differing versions or incorporated version, and using that in our
18 opening statement would be helpful. So we realize the Court has a
19 great deal to do. But in the interim, that part.

20 As far as general voir dire questions, we sent out an
21 extensive questionnaire. I don't know if Your Honor had an
22 opportunity to review it. Other than the standard military bench

1 instructions, our idea was to have that answered in a manner on the
2 questionnaires.

3 MJ [CAPT ALLRED]: Okay.

4 CDC [MR. SWIFT]: So pending seeing them, we don't have
5 additional general, but we may have individual, depending on the
6 questionnaires.

7 MJ [CAPT ALLRED]: That is entirely appropriate. Okay. Well,
8 unless I hear from counsel, I will plan to be here Monday morning at
9 9:00. Why don't we plan to start at 8:30 without the members for any
10 final housekeeping matters, and then we will plan on having the
11 members come in at 9:00 to begin the voir dire process. And if we
12 need another session over the weekend, we'll all be here. Okay?
13 Anything else then before we adjourn then today, or recess?

14 Court's in recess.

15 **[The military commission recess at 1235, 18 July 2008.]**

16 **[END OF PAGE]**